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IN THE
Supreme Court of the United States

CITY OF WARREN ET AL.,
Petitioners,

v.

JEFFREY MICHAEL MOLDOWAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What standard governs the civil liability of a police officer on a claim that he violated a criminal defendant's right to due process by withholding exculpatory evidence?

2. In an interlocutory appeal, when a court of appeals awards qualified immunity to the only individual municipal defendant, does the court have jurisdiction to recognize that the municipality will be entitled to summary judgment on that basis?

PARTIES TO THE PROCEEDING

Petitioners are the City of Warren, Michigan, and Donald Ingles. Respondent, Jeffrey Michael Moldowan, was the plaintiff-appellee below. Michael Schultz, Alan Warnick, and Maureen Fournier, defendant-appellants below, are not parties to this petition.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. B, *infra*) is reported at 578 F.3d 351. The district court's orders (Pet. App. C and D, *infra*) granting in part and denying in part summary judgment are unreported.

JURISDICTION

The Sixth Circuit entered its decision on August 18, 2009. Pet. App. 3a. The court of appeals denied petitioners' timely petition for rehearing en banc on October 23, 2009. *Id.* 1a. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including March 19, 2010. App.

09A655. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

Section 1983 of Title 42 of the United States Code provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 1291 of Title 28 of the United States Code provides, in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

STATEMENT OF THE CASE

Respondent Jeffrey Moldowan sued petitioners – a city and one of the city's police officers – under 42 U.S.C. § 1983 for allegedly violating respondent's

constitutional rights. A divided panel of the Sixth Circuit held that a police officer violates the Constitution and may be held civilly liable when he fails to provide a prosecutor with any evidence with apparent exculpatory value, even if the officer acts in complete good faith. Separately, although the court dismissed respondent's claim that a police officer had unconstitutionally destroyed evidence relating to the case, the majority nonetheless held that it lacked jurisdiction to award the city summary judgment on the same basis.

1. In 1990, officers of the City of Warren Police Department investigated a kidnapping and brutal sexual assault. The victim advised the investigating officers "that, while she was walking down the street [in the City of Warren], she was approached by [respondent] Moldowan, who was her ex-boyfriend, thrown into a white or light-colored van, and brutally beaten and raped by three of the four assailants." Pet. App. 6a. At a pre-trial hearing, evidence confirmed that, "prior to the attack, Moldowan had been abusive toward [the victim] and threatened her." *Id.* 7a. Further, the victim's sister testified that she had been told by Moldowan that "he was going to get" the victim and that, after the assault, the victim was "at the morgue." *Id.* 8a.

In 1991, a jury convicted Moldowan and a co-defendant of kidnapping, assault with intent to commit murder, and two counts of criminal sexual conduct in the first degree. In 2002, however, the Michigan Supreme Court (with the agreement of the prosecution) awarded respondent a new trial because the testimony of the prosecution's expert witnesses, who had testified about certain bite-mark evidence,

had been called into significant question. *People v. Moldowan*, 643 N.W.2d 570 (Mich. 2002). Respondent was acquitted in the ensuing retrial.

2. Moldowan subsequently filed this suit under 42 U.S.C. § 1983 against various parties. This petition involves his claims against the city and individual police officers.

First, respondent alleges that petitioner Donald Ingles (a detective in the city's police department) unconstitutionally failed to provide prosecutors with evidence having apparent value to the defense. "Moldowan's allegations, although asserted under various constitutional provisions, present claims under *Brady v. Maryland*, 373 U.S. 83 (1963)." Pet. App. 36a. Specifically, respondent contends that Ingles failed to provide prosecutors with a statement which a witness named Jerry Burroughs alleges that he made to an unidentified police officer prior to the first trial. Burroughs claims that he observed four African-American men stand over a naked woman in a street in Detroit, then drive off in a light-colored van, several hours after the abduction and assault allegedly commenced in neighboring Warren. (Moldowan is white.) Coincidentally, Burroughs states that he heard two of the same men bragging about the assault a week later and moreover had seen the victim frequent a neighborhood crack house.

Respondent asserts that petitioner Ingles is liable under Section 1983 because – although Burroughs himself does not so contend – Burroughs must have made this alleged statement to Ingles, who failed to provide it to prosecutors. Respondent also asserts that the city is liable for failing to train its officers to

act consistently with an asserted constitutional duty to provide prosecutors with any exculpatory evidence.

Respondent separately alleges that Michael Schultz (a city police officer) violated his right to due process by destroying the evidence from his first trial after the final criminal judgment in the case, in the eleven-year-period prior to the Michigan Supreme Court's order awarding respondent a retrial. Respondent also alleges that the city is in turn liable for adopting a policy or practice authorizing such destruction.

3. After the district court denied petitioners' motions for summary judgment, in which the individual defendants alleged that they were entitled to qualified immunity, Pet. App. 113a-14a, petitioners appealed. The Sixth Circuit issued a series of three amended opinions, ultimately affirming by a divided vote.

a. Preliminarily, the court of appeals recognized that it had jurisdiction over petitioners' appeals. *Id.* 15a-31a. It is settled that jurisdiction exists to hear an appeal of the denial of a motion for summary judgment on grounds of qualified or absolute immunity. *Id.* 19a-20a (citing *Abney v. United States*, 431 U.S. 651, 659 (1977)). In this case, the Sixth Circuit recognized that:

> the district court implicitly concluded that *Brady* could support a claim against a police officer who fails to disclose exculpatory materials to the prosecutor's office, as that question of law lay at the heart of those claims. That conclusion obviously has implications that reach beyond the unique

> circumstances of this case. Accordingly, this Court has jurisdiction to consider Detective Ingles' appeal.

Pet. App. 26a n.4. More broadly, "subjecting these particular Defendants to civil proceedings implicates substantial public interests." *Id.* 29a.

b. Turning to the merits of respondent's failure-to-disclose claim against petitioner Ingles, the majority recognized that "the Supreme Court [in *Kyles v. Whitley*, 514 U.S. 419, 438 (1995),] placed the responsibility to manage the state's disclosure obligations *solely* on the prosecutor despite acknowledging that 'no one doubts that police investigators sometimes fail to inform a prosecutor of all they know.'" Pet. App. 37a (quoting *Kyles*) (emphasis in original). Notwithstanding this Court's precedents, the majority held that respondent could assert "a concomitant or derivative duty under the [C]onstitution [for police officers] to turn potentially exculpatory material over to the prosecutor." *Id.* 38a. The court reasoned: "As far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather than the prosecutor suppresses exculpatory evidence because, in either case, the impact on the fundamental fairness of the defendant's trial is the same." *Id.* 41a. Moreover, in the majority's view, the obligation of the police to retain apparently exculpatory evidence under *California v. Trombetta*, 467 U.S. 479 (1984), "inexorably" also "preclude[s] [them] from concealing that exact same information from the prosecutor, the defense, and the courts." Pet. App. 44a.

The majority recognized that the Sixth Circuit had never before announced such a due process right. Relying on three prior rulings from other circuits, however, it concluded that the right was nonetheless clearly established, such that petitioner Ingles was not entitled to qualified immunity. Pet. App. 47-49a (citing *Geter v. Fortenberry*, 882 F.2d 167 (5th Cir. 1989); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964)).

c. The majority separately addressed, and rejected, Ingles's contention that – at the very least – a police officer's good faith or negligent failure to disclose evidence does not violate the Constitution. The court acknowledged the categorical holdings of the Eighth and Eleventh Circuits that to bring a suppression-based claim, "a defendant-turned-plaintiff must demonstrate that the police acted in 'bad faith.'" Pet. App. 50a (citing *Porter v. White*, 483 F.3d 1294 (11th Cir. 2007); *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004)). But the majority was persuaded by the contrary reasoning of the Fourth Circuit's 1964 ruling in *Barbee*, *supra*, which granted habeas corpus relief to a defendant on the basis of evidence that was in the possession of the police but not provided to the defendant, reasoning that "[t]he police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure." 331 F.2d at 846.

According to the Sixth Circuit majority, "[w]here the exculpatory value of a piece of evidence is 'apparent,' the police have an *unwavering* constitutional duty to preserve and ultimately

disclose that evidence. The failure to fulfill that obligation constitutes a due process violation, regardless of the [sic] whether a criminal defendant or § 1983 plaintiff can show that the evidence was destroyed or concealed in 'bad faith.'" Pet. App. 63a-64a (emphasis in original). "[T]he police have an *absolute* duty to preserve and disclose that information." *Id.* 52a (emphasis in original).

The majority recognized that its holding established a "difference in the requisite inquiry" governing the disclosure obligations of prosecutors and police: the prosecution's duty is limited to "material" exculpatory evidence; police, according to the Sixth Circuit, are subject to the "additional burden" of more broadly disclosing all evidence for which any "exculpatory value" is "apparent." Pet. App. 62a.

The majority finally noted that respondent could also pursue a claim that Ingles had in fact acted in bad faith. As noted, Burroughs does not even assert that he made his statement to Ingles, and there is moreover no evidence that Ingles had any motivation to act with ill will in this case. But without elaboration, the majority stated: "Burroughs' testimony, taken as a whole, provides sufficient evidence for Moldowan's claims to survive summary judgment because a jury could reasonably conclude that Detective Ingles acted in bad faith." Pet. App. 65a.

d. Separately, the Sixth Circuit addressed respondent's claim arising from the destruction of the evidence from his first trial after his conviction became final. After full discovery, respondent named

only Officer Schultz as the city employee involved in the destruction. The court of appeals held that Schultz was entitled to qualified immunity, however, because his role was "entirely ministerial" and he thus could not have intended to destroy valuable evidence. Pet. App. 72a.

The majority nonetheless held that it lacked jurisdiction to award the city summary judgment on the same basis. Pet. App. 77a. The majority did not doubt that the city is *entitled* to summary judgment. To the contrary, it acknowledged that after "extensive discovery" the state of the record is as follows: respondent has not "identif[ied] the individual responsible for ordering the destruction"; he "has not introduced any evidence of an official policy directing officers to withhold exculpatory evidence"; "[n]or has he alleged a 'clear and persistent pattern' of such conduct"; and the city has presented "deposition testimony and sworn statements" that "no such pattern or custom exists." *Id.* 75a n.19. But the majority reasoned that, given its limited jurisdiction, "whether Moldowan has alleged facts sufficient to satisfy the elements of a claim for municipal liability is beyond the scope of this interlocutory appeal." *Ibid.*

4. Judge Kethledge concurred in the judgment in part and dissented in part. With respect to respondent's failure-to-disclose claim against Detective Ingles, Judge Kethledge explained that "the Supreme Court [in *Kyles*] specifically refused to impose the *Brady* duty directly upon the police." Pet. App. 95a. *Kyles* thus held that prosecutors have a duty to secure material exculpatory evidence from officers and to disclose that evidence to the defense.

The majority's extension of the *Brady* obligation to police officers, Judge Kethledge explained, will produce "a significant increase in lawsuits against police officers," who unlike prosecutors lack "absolute immunity for actions taken in their official capacities." *Id.* 96a. "But if an officer bears an absolute duty to disclose materially exculpatory evidence, *all* of the information thus filtered by an officer's judgment, even in the purest good faith, potentially becomes the basis of a lawsuit against him." *Id.* 97a (emphasis added).

Like the majority, Judge Kethledge recognized that the Eighth and Eleventh Circuits "have addressed the issue directly; and both of them pointedly refused" to extend *Brady* to police officers. Pet. App. 98a. By contrast, the appellate decisions cited by the majority in denying petitioner Ingles qualified immunity "find liability for precisely the sort of bad-faith conduct that would give rise to liability under virtually any standard." *Id.* 99a.

Judge Kethledge did agree with the majority that respondent could pursue a claim that Ingles had in fact withheld Burroughs's statement from prosecutors in bad faith. Judge Kethledge relied on Burroughs's testimony that he had told "my story" to an unidentified officer: "Burroughs' testimony could be read to mean that he told Ingles that two men had essentially admitted to committing the crime Ingles was investigating." Pet. App. 103a. "[U]nder the circumstances present here, a jury could infer bad faith from Ingles' failure to disclose Burroughs' statement—whose existence, to be fair, Ingles disputes—to the prosecutor." *Id.* 104a. The concurrence concluded that the two rules could

"operate as the functional equivalent" of each other. *Id.* 105a.

Judge Kethledge separately dissented from the majority's refusal to hold that petitioner City of Warren is entitled to summary judgment on respondent's destruction-of-evidence claim. Because all members of the panel agreed that Officer "Schultz did not violate Moldowan's constitutional rights when he disposed of the evidence from Moldowan's first trial," Judge Kethledge would have reached the obvious conclusion that the city "cannot be liable under § 1983 on this claim." Pet. App. 106a.

5. The full Sixth Circuit denied rehearing en banc. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

This Court's review of the Sixth Circuit's ruling is essential. By holding that police officers are liable in damages for even the innocent failure to provide prosecutors with every bit of evidence with any apparent exculpatory value, the decision below conflicts with the precedents of this Court and with rulings of four other circuits. The decision below will also open the floodgates to suits by criminal defendants against municipalities and their employees, which have to date largely avoided the significant burdens of such litigation because the absolute duty to disclose exculpatory evidence has until now rested on prosecutors, who have absolute immunity from civil liability. Review is also warranted of the court of appeals' holding that it lacked jurisdiction to consider the city's appeal of respondent's destruction-of-evidence claim once it held that the only individual municipal defendant

was entitled to summary judgment. The Sixth Circuit's narrow reading of its "pendent jurisdiction" over the city's appeal is the subject of a square three-to-two circuit split that arises from irreconcilable interpretations of this Court's precedents.

I. THIS COURT SHOULD REVIEW THE SIXTH CIRCUIT'S HOLDING THAT DETECTIVE INGLES IS NOT ENTITLED TO QUALIFIED IMMUNITY.

A. The Sixth Circuit's Holding That A Police Officer Acting In Good Faith Violates A Defendant's Right To Due Process By Withholding Evidence That Has Any Apparent Exculpatory Value Conflicts With This Court's Precedents And With Rulings Of Four Circuits.

The Sixth Circuit held that a police officer violates the Constitution, and is in turn liable for damages in civil litigation, if he fails to provide prosecutors with any piece of evidence that a jury later determines has "apparent" exculpatory value. On that view, the officer's good or bad faith is irrelevant. Certiorari should be granted because that ruling conflicts with this Court's precedents and is the subject of a significant and widely acknowledged circuit conflict.

1. The ruling below conflicts with two lines of this Court's decisions. *First*, this Court has rejected the central premise of the Sixth Circuit's ruling: that negligent conduct by governmental officials violates due process. In *Daniels v. Williams*, the Court addressed "when tortious conduct by state officials

rises to the level of a constitutional tort," squarely holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." 474 U.S. 327, 328, 329 (1986) (emphasis in original). *Daniels* explained that "the word 'deprive' in the Due Process Clause connote[s] more than a negligent act," and that the constitutional guarantee has accordingly "been applied to *deliberate* decisions of government officials." *Id.* at 330, 331 (emphasis in original). Indeed, on that question, *Daniels* expressly overruled in relevant part the contrary holding of *Parratt v. Taylor*, 451 U.S. 527 (1981), that negligence could give rise to a due process violation.

More recently, this Court revisited the issue in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Reiterating the Court's holding in *Daniels* that mere negligence does not "wor[k] a deprivation in the *constitutional sense*," 474 U.S. at 330 (quotation omitted), *Lewis* explained that "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 523 U.S. at 849 (citing *Daniels*, 474 U.S. at 328) (alteration and emphasis in original). *See also, e.g., Fla. Prepaid Postsecondary Educ. Exp. Bd. v. College Sav. Bank*, 527 U.S. 627, 645 (1999) ("Such negligent conduct, however, does not violate the Due Process Clause of the Fourteenth Amendment."). Directly contrary to the holding of *Daniels*, reiterated in *Lewis*, the Sixth Circuit held in this case that mere negligence by police officers in failing to provide prosecutors with exculpatory evidence violates due process.

Second, the ruling below conflicts with this Court's square holding that the government's responsibility to secure and disclose exculpatory evidence from investigatory agents lies with the prosecution, not the police. As the dissenting opinion below explained, and the majority itself recognized, *see* Pet. App. 38a-39a, 95a, this Court ruled in *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), that the duty instead lies with "the individual prosecutor," who "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." The Sixth Circuit's extension of the disclosure obligation to police officers "amount[s] to a serious change of course from the *Brady* line of cases." *Id.* at 438. This Court's precedents instead establish "the special role played by the American *prosecutor* in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (emphasis added).

The Sixth Circuit's decision cannot be reconciled with *Kyles*. The majority below adopted precisely the extension of *Brady* to police officers that this Court rejected. Remarkably, the court of appeals avowedly imposed a *more onerous* requirement on police officers than the standard applied to prosecutors under *Brady* and its long-settled progeny. The majority below recognized that its newly minted duty to disclose any "apparently" exculpatory evidence is broader than the prosecutor's obligation to provide defendants only with "material" exculpatory evidence. Pet. App. 62a. Of course, the majority failed to explain how the police could violate a defendant's right to due process by withholding immaterial exculpatory evidence when the

prosecution has no obligation to provide that evidence to the defense.

The consequences of the Sixth Circuit's holding that police officers may be held liable for even innocently withholding exculpatory evidence cannot be overstated. Federal, state, and local police officers annually conduct hundreds of thousands of investigations involving millions of pieces of evidence. Criminal defendants targeted by the police regularly institute civil rights litigation based on officers' supposed failure to provide prosecutors with evidence that is assertedly exculpatory. Until the ruling below, governments and their individual employees were largely protected from vexatious litigation. Under *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976), such claims cannot be brought against prosecutors, who have absolute immunity. As to police officers, the requirement that a putative plaintiff demonstrate "bad faith" – rather than simply file suit regarding an officer's treatment of a single piece of evidence – is a central bulwark holding back an avalanche of litigation that if permitted to proceed to discovery and trial would distract and financially strain already burdened police departments. For proof of that fact one need look no further than the numerous district court rulings around the country dismissing similar claims on precisely that basis.[1]

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[1] For cases decided in just the past two years, see *Whitley v. Allegheny County*, No. 07-403, 2010 U.S. Dist. LEXIS 21262, at *104 (W.D. Pa. Mar. 9, 2010) (standard to avoid dismissal: claim must establish "more than mere negligence"); *McLain v. City of Ridgeland*, No. 3:06-cv-00534 HTW-FKB, 2010 U.S. Dist. LEXIS 17498, at *22-*23 (S.D. Miss. Feb. 28, 2010) ("deliberately and intentionally concealed and withheld evidence"); *Rosales v.*

2. Certiorari is also warranted to resolve the circuit conflict avowedly created by the ruling below. "Circuit courts disagree . . . about what level of culpability is required to find police officers personally liable under § 1983 for *Brady* violations." *Elkins v. Summit County*, No. 5:06-CV-3004, 2009 U.S. Dist. LEXIS 36077, at *16 (N.D. Ohio Apr. 28, 2009). "There is a split in the circuits." *Stoll v. County of Kern*, No. 1:05-CV-01059, 2008 U.S. Dist. LEXIS 86535, at *33 (E.D. Cal. Sept. 8, 2008). But "[t]he great weight of circuit authority agrees" that a

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Kikendall, No. 08-CV-6113L, 2010 U.S. Dist. LEXIS 673, at *15 n.2 (W.D.N.Y. Jan. 6, 2010) ("intent of denying plaintiff a fair hearing"); *Glass v. City of Gainesville*, No. 4:09-cv-189, 2009 U.S. Dist. LEXIS 75392, at *11 (E.D. Tex. Aug. 25, 2009) ("deliberately ignored exculpatory evidence or conducted a reckless investigation"); *Friedman v. New York City Administration for Children's Servs.*, No 04-3077, 2009 U.S. Dist. LEXIS 62175, at *14 (E.D.N.Y. July 21, 2009) ("deliberately failed to disclose facts that he knew were material"); *Hernandez v. City of El Paso*, 662 F. Supp. 2d 596, 615 (W.D. Tex. 2009) ("deliberately ignores exonerative evidence or conducts a reckless investigation"); *Smith v. Short*, No. 07-515-KI, 2008 U.S. Dist. LEXIS 96267, at *12 (D. Or. Nov. 21, 2008) ("deliberately withheld exculpatory evidence"); *Windham v. Graham*, No. 9:08-cv-1935-PMD-GCK, 2008 U.S. Dist. LEXIS 72996, at *21 (D.S.C. Aug. 14, 2008) ("Plaintiff has failed to state a claim under § 1983 based on an allegation that the police negligently failed to include the evidence Plaintiff seeks."); *Moore v. Higgins*, No. 4:06-CV-00973 SNL, 2008 U.S. Dist. LEXIS 42608, at *13 (E.D. Mo. May 29, 2008) (claim requires "*a showing of bad faith*" (emphasis in original)); *Ihekoronye v. City of Northfield*, No. 07-CV-1642, 2008 U.S. Dist. LEXIS 26386, at *20 (D. Minn. Mar. 31, 2008) ("Ultimately, there is a total lack of any bad faith, as required for a procedural due process violation. There is no showing whatsoever of behavior which shocks the conscience, as required for a substantive due process violation.").

failure-to-disclose claim requires proof of bad faith. Martin A. Schwartz, *Section 1983 Brady Claims*, N.Y.L.J., Apr. 18, 2008. Indeed, every federal court of appeals to consider the question – four in all – rejects the rule adopted by the Sixth Circuit in this case.

a. The Sixth Circuit acknowledged a square conflict between its decision and the precedent of the Eighth Circuit. *See* Pet. App. 50a. In an uninterrupted line of five decisions, that court has held that a police officer may be sued for withholding evidence – including evidence with obvious exculpatory value – only upon proof that he affirmatively acted in bad faith and "intended to deprive the defendant of a fair trial." *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008) (withholding of evidence of officer's own affair with victim's mother, as well as victim's diary that did not corroborate molestation allegations) (quoting *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004) (bad faith standard applies to "materially favorable evidence")). *See also Clemmons v. Armontrout*, 477 F.3d 962, 966 (8th Cir. 2007) (discussed *infra* at 21); *Reasonover v. St. Louis County*, 447 F.3d 569, 585-86 (8th Cir. 2006) (bad faith standard applies to failure to disclose tape recording showing defendant's belief in her own innocence); *Flynn v. Brown*, 395 F.3d 842, 845 (8th Cir. 2005) (bad faith standard applies to failure to disclose video tape demonstrating that prosecution's central witness gave false testimony).

The ruling below equally conflicts with the precedent of the Fifth Circuit, which holds that an evidence-suppression claim lies only against a police

officer "who, after learning of 'patently exculpatory evidence,' deliberately fails to disclose it to the prosecutor." *Hart v. O'Brien*, 127 F.3d 424, 446-47 (5th Cir. 1997) (applying *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992)).

The Ninth Circuit takes yet another approach. That court holds that a claim that officers withheld "material, exculpatory evidence from prosecutors" does not require a showing of "bad faith" – expressly recognizing its disagreement with the Eighth Circuit – but nonetheless requires the plaintiff to prove that the officer "acted with deliberate indifference to or reckless disregard for the accused's rights or for the truth." *Tennison v. City & County of San Fran.*, 570 F.3d 1078, 1088 & n.5 (9th Cir. 2009).

The Sixth Circuit also recognized that its decision conflicts with the precedent of the Eleventh Circuit. *See* Pet. App. 44a. That court has not specified a precise standard for stating a claim alleging police suppression of exculpatory evidence, but it has expressly rejected the Sixth Circuit's holding that mere negligence is sufficient. *Porter v. White*, 483 F.3d 1294, 1307-08 (11th Cir. 2007).

Although the balance of circuit authority is distinctly lopsided against the holding of the Sixth Circuit, the substantial debate over the question in the lower courts – and hence the need for this Court's guidance – is vividly illustrated by the Fourth Circuit's disposition of *Jean v. Collins*, 155 F.3d 701 (4th Cir. 1998) (en banc), *vacated and remanded for further consideration*, 526 U.S. 1142 (1999), *and aff'd by an equally divided court*, 221 F.3d 656 (4th Cir. 2000). There, the en banc court of appeals adopted a "bad faith" requirement by a six-to-five vote. After

this Court vacated and remanded the case for further consideration in light of *Wilson v. Layne*, 526 U.S. 603 (1999), the Fourth Circuit divided evenly on the issue by a five-to-five vote. *Jean*, 221 F.3d 656. The Fourth Circuit itself regards its ruling in *Jean*, which affirmed the dismissal of the claims against the officer, as imposing a "bad faith" requirement. *See Smith v. McCarthy*, No. 09-6200, 2009 U.S. App. LEXIS 23861, at *14 n.10 (4th Cir. Oct. 28, 2009).

b. There is no merit to the suggestion of the concurrence below that the circuits' conflicting standards for finding police officers liable might ultimately amount to the same standard. In fact, the stark contrast between the competing rules is obvious. The Sixth Circuit permits the imposition of liability when the police operate in complete good faith and merely inadvertently fail to provide prosecutors with evidence with apparent exculpatory value. Four other circuits hold that liability does not arise in that recurring scenario.

Take this very case, and make the ambitious assumption that Burroughs even spoke with petitioner Ingles or that Ingles otherwise came to possess Burroughs's alleged pre-trial statement. In the Sixth Circuit, respondent contends that Ingles's liability follows automatically from the failure to provide the statement to prosecutors. But in the Fifth, Eighth, Ninth, or Eleventh Circuits, respondent would have to go much further to prove his case: he would have to establish that Ingles acted in bad faith or (in the Ninth Circuit) with reckless disregard for the truth. That would be a significant hurdle, given that there is no evidence that Ingles harbored any malice or did anything other than

perform his job. Nor would an inference of bad faith logically arise. Among many possibilities, the jury could find that Ingles in good faith concluded that Burroughs (who did not witness the assault) was not credible. Or the jury could conclude that the failure to disclose the statement was a result of good faith miscommunication between police officers.

For the same reason, the court of appeals' statement that respondent alternatively could pursue a claim that Ingles acted in bad faith does not undercut the basis for this Court's review. The Sixth Circuit's legal holding that bad faith is not required to establish a due process violation conflicts with this Court's precedent and decisions of other courts of appeals and, because it will control later litigation in that circuit, merits certiorari. In the event this Court adopts the overwhelming majority view that such a claim requires a showing of bad faith, it can then determine whether to remand the case for further proceedings under that significantly stricter standard.

Importantly, absent this Court's intervention, the trial in this case will *not* proceed under the "bad faith" standard applied by every other circuit. Respondent specifically will not be required to put on evidence of Ingles's intent, and the jury will not be required to make findings on that issue. Thus, the judgment that would arise if the case proceeded directly to trial without this Court's intervention is not likely to present a later vehicle to decide the question presented. Rather, this is the single opportunity for the Court to resolve the significant conflicts created by the ruling below.

Further, the Sixth Circuit's ruling that petitioners are not entitled to summary judgment under a "bad faith" standard itself gives rise to a circuit conflict that warrants this Court's review. Other circuits hold plaintiffs to a significantly more rigorous standard and would have held that Ingles is entitled to qualified immunity. Thus, in *Clemmons v. Armontrout*, *supra*, an officer did not advise prosecutors of a statement by a witness to a murder that two men other than the defendant had actually committed the assault. 477 F.3d 962, 966 (8th Cir. 2007). The Eighth Circuit granted the defendant a writ of habeas corpus on the basis of that evidence, *Clemmons v. Delo*, 124 F.3d 944, 947 (8th Cir. 1997), and he was acquitted on a retrial, *see Clemmons v. Armontrout*, 477 F.3d at 965. In the defendant's subsequent civil rights suit, however, the Eighth Circuit held that the officer's failure to disclose the statement to prosecutors did not state a due process claim because there was "no evidence [that the officer] consciously sought to suppress exculpatory evidence by failing to disclose [a report of the statement] to the prosecutor." 477 F.3d at 966-67. *See also ibid.* ("Even allegations of gross negligence fail to establish a constitutional violation.").

Porter v. White, 483 F.3d 1294, *supra*, reached the same conclusion on similarly indistinguishable facts. There, the defendant was convicted of numerous offenses, including rape, and was sentenced to life without parole. The Eleventh Circuit subsequently granted him a writ of habeas corpus based on the failure to disclose favorable police reports. *Porter v. Moore*, 31 Fed. Appx. 940 (11th Cir. 2002). At his retrial, the defendant was acquitted. *See Porter v. White*, 483 F.3d at 1297. But

in the defendant's subsequent civil rights suit, the Eleventh Circuit held that the officers who failed to disclose the reports were entitled to summary judgment. *Id.* at 1311. The court explained that there was "no evidence – beyond the evidence as summarized in Porter's own brief and beyond his conclusory allegations – to bolster Porter's assertion that [the officer] intentionally withheld the [police] report from the prosecution," *id.* at 1310:

> The strongest permissible inference that one might conceivably draw from these facts is that the [police] report failed to reach the State Attorney's Office on account of some negligent act or omission properly attributable to Fairbanks, the official charged with the duty to deliver the police reports to the prosecution. . . . Even assuming that the Hendrickson report was misplaced by negligence in Fairbanks's office, however tenuous that assumption, there is no evidence of ill-will or motive on the part of Fairbanks. Indeed, there is absolutely no evidence from which a jury could reasonably infer intent to withhold, recklessness, or anything more than mere negligence.

Id. at 1310-11.

Here, as in both *Clemmons* and *Porter*, respondent was acquitted on the basis of newly discovered evidence. But given that there is no evidence that petitioner Ingles himself acted in "bad faith," summary judgment would have been awarded by the circuits that follow this Court's precedents and

hold that mere negligence does not give rise to a due process violation.[2]

B. Even If The Sixth Circuit's Holding Represents A Correct Statement Of The Law, That Rule Was Not Clearly Established At The Time Of The Events Of This Case, And Detective Ingles Is Entitled To Qualified Immunity.

Certiorari is independently warranted because the ruling below conflicts with this Court's decisions establishing the contours of qualified immunity and with decisions of other circuits faithfully applying those precedents. "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson v. Callahan*, 129 S. Ct. 808, 823 (2009). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citing *Malley v. Briggs*, 475 U.S. 335,

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[2] The Sixth Circuit held that the city could be held liable on the same theory as Detective Ingles:

> Because we already have determined that the police have a duty to preserve and turn over to the prosecutor evidence that the police recognize as having exculpatory value or where the exculpatory value of the evidence is apparent, [precedent] dictates that the City has a corresponding obligation to adequately train its officers in that regard.

Pet. App. 74a-75a. The city's liability accordingly rises or falls with the liability of petitioner Ingles under the first question presented by the Petition.

341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law")). The qualified immunity inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (internal quotation marks omitted).

The Sixth Circuit held that petitioner Ingles was not entitled to qualified immunity, and permitted respondent's claim to proceed to trial, on the theory that prior out-of-circuit precedent had established that police officers may not suppress exculpatory evidence. Pet. App. 35a-66a. The court of appeals' analysis was deeply flawed. The majority below was unable to identify any precedent – because none exists – supporting the "*absolute*" and "*unwavering*" rule it adopted, Pet. App. 52a, 63a-64a (emphases in original): that civil liability arises from police officers' failure to produce any evidence with apparent exculpatory value. The three appellate decisions cited by the majority below, *see* Pet. App. 47a-49a, are either irrelevant or instead hold far more narrowly that the police may be held liable only for the purposeful suppression of exculpatory evidence:

- *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964), held that a criminal defendant was entitled to a writ of habeas corpus on the basis of evidence possessed by the police that had not been disclosed to the defendant. *Barbee* says nothing about the civil liability of police officers, and is completely consistent with this Court's subsequent holding in *Kyles*,

supra, that the government's obligation to disclose material evidence under *Brady* is borne by prosecutors.

- *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988), holds precisely the opposite of the Sixth Circuit in this case. The Seventh Circuit there ruled that "negligence is no longer culpable under section 1983. Gross negligence is not enough either." *Id.* at 992.

- *Geter v. Fortenberry*, 882 F.2d 167 (5th Cir. 1989), holds that a Section 1983 suit may proceed against a police officer who "procures false identification by unlawful means or deliberately conceals exculpatory evidence." *Id.* at 170 (citation omitted). Absent those allegations, the court of appeals held, the officer would be entitled to qualified immunity. *Ibid.*

The holding of these courts that the *purposeful* concealment of evidence by police violates the Due Process Clause is not a basis for the Sixth Circuit's decision to withhold qualified immunity for *innocent* conduct. Even where prior precedent establishes a legal principle as a "general proposition" – for example, that officers may in some circumstances be held liable for withholding evidence – "that is not enough":

> Rather, we emphasized in *Anderson* [*v. Creighton*], "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a

> reasonable official would understand that what he is doing violates that right." 483 U.S. [635,] 640 [(1987)]. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Saucier v. Katz, 533 U.S. 194, 201-02 (2001). Ingles is entitled to qualified immunity precisely because, "prior to the [Sixth] Circuit's decision in the present case, no court of appeals had issued a contrary decision" holding that good faith actions by police officers in failing to produce evidence would violate due process. *Pearson*, 129 S. Ct. at 823.

The conclusion that Detective Ingles is not subject to suit for his conduct taken in good faith is significantly reinforced by the substantial body of case law that has emerged in recent years. As discussed above, far from a consensus emerging in support of the Sixth Circuit's holding, the ruling below conflicts with the near-uniform view of the courts of appeals. "In *Wilson*, we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that '[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'" *Pearson*, 129 S. Ct. at 823 (quoting 526 U.S. at 618). At the very least, the cases rejecting the Sixth Circuit's standard "are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that that [the courts] were sufficiently clear in the prior statement of the law" to deprive Ingles of

qualified immunity. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2644 (2009).[3]

This Court's intervention is furthermore warranted because the ruling below conflicts with the precedent of two other circuits. The Third Circuit has held that police officers are entitled to qualified immunity on evidence-suppression claims that arose prior to this Court's 1995 decision in *Kyles*, *supra*, at the earliest. That court explained that "the Supreme Court did not settle" that evidence possessed by police was subject to *Brady* until *Kyles*; further, as of 2000, that circuit had only "assume[d]" that the police had a duty to disclose exculpatory evidence. *Gibson v. Superintendent*, 411 F.3d 427, 444 (3d Cir. 2005) (citing *Smith v. Holtz*, 210 F.3d 186, 197 n.14 (3d Cir. 2000)).

The Eighth Circuit takes a different approach. That court holds that an officer is entitled to qualified immunity *unless* the plaintiff proves that the officer "deliberately" failed to provide exculpatory evidence. *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008). Although unable to point to precedent on the precise issue, the Eighth Circuit reasons that a "reasonable officer" would recognize that he could not

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[3] Similarly, to the extent that respondent contends that the cases implicated by the circuit conflict over whether officers may be held liable for the good faith failure to produce evidence turn on their particular facts, that assertion only supports the conclusion that Ingles is entitled to qualified immunity. *See Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (In an "area . . . in which the result depends very much on the facts of each case," with no ruling that "squarely governs the case here," then the existing precedent "by no means 'clearly establish' that [the officer's] conduct violated" the Constitution).

"deliberately misrepresent" the evidence in his possession. *Ibid.*

Petitioner Ingles would be entitled to qualified immunity under the approach of either the Third or Eighth Circuits. The events in this case occurred prior to this Court's decision in *Kyles*. So too, the Sixth Circuit had never held before this case (much less prior to the events giving rise to the case two decades ago in 1990) that the police had an independent duty to disclose exculpatory evidence. But at the very least, qualified immunity is appropriate with respect to respondent's allegation that Ingles violated due process by withholding Burroughs's alleged statement in good faith. There is no support for the Sixth Circuit's ruling that Ingles's liability rests upon "clearly established" law.

In sum, certiorari is warranted because the Sixth Circuit's holding that respondent may pursue his evidence-suppression claim against Detective Ingles conflicts with this Court's precedents and decisions of other circuits.

II. THIS COURT SHOULD REVIEW THE SIXTH CIRCUIT'S HOLDING THAT IT LACKED JURISDICTION TO AWARD SUMMARY JUDGMENT TO THE CITY OF WARREN.

In challenging the failure to preserve evidence from his initial trial, respondent identified only Officer Schultz as an individually responsible city employee. The Sixth Circuit correctly held, however, that Schultz was entitled to qualified immunity on that claim because there was no evidence that he intended to destroy valuable evidence. Pet. App. 72a.

The court of appeals recognized that there similarly was no evidence either that some other city official had ordered the destruction of the evidence or that there was a city policy authorizing the inappropriate destruction of evidence. *Id.* 75a n.19. The city is accordingly entitled to summary judgment under the holding of *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), that a municipality may only be held liable if one of its agents acted unlawfully. Judge Kethledge thus would have reached the city's appeal and held that it was automatically entitled to summary judgment. Pet. App. 106a. But the majority held that "whether Moldowan has alleged facts sufficient to satisfy the elements of a claim for municipal liability is beyond the scope of this interlocutory appeal." *Id.* 75a n.19.

The determination whether a court of appeals has jurisdiction over a municipality's appeal in these circumstances turns on the proper interpretation of *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). In that case, individuals appealed from the district court's holding that they were not entitled to qualified immunity on summary judgment. *Id.* at 40. The Eleventh Circuit decided that appeal and furthermore exercised "pendent jurisdiction" over the county's appeal that an individual defendant was not its "policymaker" for purposes of establishing municipal liability. *Id.* at 40-41. The substance of the two appeals was unrelated: "The individual defendants' qualified immunity turns on whether they violated clearly established federal law; the county commission's liability turns on the allocation of law enforcement power in Alabama." *Id.* at 51. This Court held that the court of appeals lacked jurisdiction over the county's appeal in that

circumstance. *Ibid.* But the Court declined to "definitively or preemptively settle here whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." *Id.* at 50-51. It specifically left open whether jurisdiction would exist when the disposition of the municipality's "summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter." *Id.* at 51.

The Sixth Circuit's holding that it lacks jurisdiction in the recurring circumstances of this case – where a municipality asserts that the absence of any individually liable employee entitles the municipality to summary judgment – is consistent with that court's prior decision in *Crockett v. Cumberland College*, 316 F.3d 571, 578-79 (6th Cir. 2003). It is also consistent with the settled precedent of the Second and Eleventh Circuits, both of which have considered this precise question in multiple cases and concluded that jurisdiction does not exist in light of *Swint*. *Deters v. Lafuente*, 368 F.3d 185, 188 n.3 (2d Cir. 2004); *Munafo v. Metropolitan Transp. Auth.*, 285 F.3d 201, 215 (2d Cir. 2002); *Johnson v. NewBurgh Enlarged Sch. Dist.*, 239 F.3d 246, 255 (2d Cir. 2001); *Harris v. Board of Educ.*, 105 F.3d 591, 595 (11th Cir. 1997) (per curiam); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995); *Haney v. City of Coming*, 69 F.3d 1098, 1102 (11th Cir. 1995). *See also Cunningham v. Gates*, 229 F.3d 1271, 1285-86 & n.20 (9th Cir. 2000) (reaching the same conclusion based on that court's "very narrow"

application of pendent appellate jurisdiction, in conflict with rulings of another circuit).

Those decisions squarely conflict, however, with the precedent of the Eighth and Tenth Circuits, which have similarly extensive bodies of precedent reading *Swint* to permit a federal court of appeals to exercise "pendent jurisdiction" over a municipality's appeal, and awarding the municipality summary judgment, when as here the relevant individual municipal employee is entitled to qualified immunity. *Sherbrooke v. City of Pelican Rapids*, 513 F.3d 809, 813 (8th Cir. 2008) ("[W]e have jurisdiction to consider the City's appeal of the denial of summary judgment on Sherbrooke's allegation that a municipal policy caused a violation of his constitutional rights, because the merits of the City's appeal is inextricably intertwined with the question whether the officers violated Sherbrooke's rights."); *Smook v. Minnehaha County*, 457 F.3d 806, 813 (8th Cir. 2006) ("Because Minnehaha County's appeal regarding liability for the search of Smook is inextricably intertwined with the appeal of the individual defendants, we have jurisdiction to consider the county's appeal on that point."); *Avalos v. City of Greenwood*, 382 F.3d 792, 801 & n.1 (8th Cir. 2004); *Green v. Post*, 574 F.3d 1294, 1310 (10th Cir. 2009) ("In light of our reversal of the district court's decision, and the necessity that summary judgment be granted to Deputy Post on the ground of qualified immunity, we exercise pendent appellate jurisdiction over the constitutional claims against the PCSD. We have held that a municipality may not be held liable where there was no underlying constitutional violation by any of its officers. We accordingly reverse the district court's denial of the motion for dismissal/for summary judgment filed by

the PCSD and remand for entry of summary judgment for the PCSD." (citing *Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006) (citing *Heller*, 475 U.S. at 799) (quotation marks omitted))); *Cruz v. City of Laramie*, 239 F.3d 1183, 1190-91 (10th Cir. 2001) ("The *Swint* court held that pendent appellate jurisdiction allows review of an otherwise nonappealable decision that is 'inextricably intertwined' with an appealable decision. That situation exists here because plaintiff's claim of inadequate training relates directly to the objective reasonableness of the officers' conduct, the issue involved in the appealable order. We therefore may consider whether the district court erred in denying the City's motion."); *Deanzona v. City & County of Denver*, 222 F.3d 1229, 1234 (10th Cir. 2000) ("We exercise pendent jurisdiction over the substantive due process claims against Brooks and Denver because the review of Brooks's qualified immunity necessarily resolves these otherwise unappealable claims.").

This Court's intervention is required not only because the conflict is well developed and recurs frequently, but also because it arises directly from irreconcilable interpretations of this Court's ruling in *Swint*, *supra*. Only this Court can determine which reading of *Swint* is correct. Further, the Eighth and Tenth Circuits' holding that jurisdiction exists in these recurring circumstances represents the better reading of the federal jurisdictional statutes, which are intended to ensure the economical disposition of litigation. There is no basis for allowing the district court's denial of summary judgment to stand, given that the court of appeals' holding that Officer Schultz is entitled to qualified immunity should

automatically dispose of respondent's claim against the city as well. *See City of Los Angeles v. Heller*, *supra*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 19, 2010

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-2115

FILED Oct. 23, 2009

ORDER

JEFFREY MICHAEL MOLDOWAN,

Plaintiff-Appellee,

v.

CITY OF WARREN, ET AL.,

Defendants-Appellants.

BEFORE: MOORE, CLAY, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ _____
Leonard Green
Clerk

APPENDIX B

United States Court of Appeals,
Sixth Circuit.

Jeffrey Michael MOLDOWAN, Plaintiff-Appellee,
v.
CITY OF WARREN, Donald Ingles, Michael Schultz (07-2115); Alan Warnick (07-2116); Maureen Fournier (07-2117), Defendants-Appellants.

Nos. 07-2115, 07-2116, 07-2117.
Argued: Jan. 20, 2009.
Decided and Filed: Aug. 18, 2009.
Rehearing and Rehearing En Banc Denied Oct. 23, 2009.

ARGUED: Rosalind Rochkind, Garan Lucow Miller, P.C., Detroit, Michigan, Brian J. Richtarcik, Chapman & Associates, P.C., Bloomfield Hills, Michigan, Sarah R. Prout, Lakeshore Legal Aid, Port Huron, Michigan, for Appellants. Michael R. Dezsi, Fieger, Fieger, Kenney, Johnson & Giroux, Southfield, Michigan, for Appellee. **ON BRIEF:** Rosalind Rochkind, Jami E. Leach, Garan Lucow Miller, P.C., Detroit, Michigan, Brian J. Richtarcik, Ronald W. Chapman, Chapman & Associates, P.C., Bloomfield Hills, Michigan, Sarah R. Prout, William R. Knight, Lakeshore Legal Aid, Clinton Township, Michigan, for Appellants. Marc M. Susselman, Dennis A. Dettmer, Detroit, Michigan, for Appellee.

Before: MOORE, CLAY, and KETHLEDGE, Circuit Judges.

CLAY, J., delivered the opinion of the court, in which MOORE, J., joined. KETHLEDGE, J. (pp. 401-07), delivered a separate opinion concurring in the judgment in part and dissenting in part.

SECOND AMENDED OPINION

CLAY, Circuit Judge.

In this action, Plaintiff Jeffrey Moldowan ("Moldowan") asserts a number of claims under 42 U.S.C. § 1983 alleging violations of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments, as well as claims under Michigan state law. Moldowan's claims arise out of his arrest, criminal prosecution, conviction, and retrial for the 1990 abduction and brutal sexual assault of Maureen Fournier ("Fournier"). After new evidence came to light and a key prosecution witness recanted her testimony, the Michigan Supreme Court reversed Moldowan's conviction in 2002. *People v. Moldowan*, 466 Mich. 862, 643 N.W.2d 570 (2002). On retrial, in February 2003, Moldowan was acquitted of all charges and released, having served nearly twelve years in prison.

After his release, Moldowan filed the instant civil action asserting various claims against the City of Warren, the Warren Police Department, Macomb County, the Macomb County Prosecutor in his official capacity, Dr. Alan Warnick, Warren Police Detective

Donald Ingles, Warren Police Officer Mark Christian, and Fournier. Moldowan subsequently amended his complaint to assert claims against Warren Police Officer Michael Schultz. Broadly speaking, Moldowan alleges that the Defendants-both acting separately and conspiring together-violated his civil rights by fabricating evidence against him, failing to disclose exculpatory evidence, and pursuing his prosecution and retrial without probable cause.

After discovery, the Defendants moved for summary judgment on all thirty-six counts asserted in Moldowan's Third Amended Complaint raising various immunity defenses. After dismissing certain counts against Detective Ingles, the City of Warren, and the Warren Police Department, and dismissing all counts against Officer Christian, the district court denied Defendants' motions for summary judgment in all other respects. These three interlocutory appeals followed. For the reasons set forth herein, we **AFFIRM IN PART** and **REVERSE IN PART** the judgment of the district court.

I.

Moldowan's Third Amended Complaint asserts thirty-six claims against nine county, municipal, and individual defendants. All claims arise out of Moldowan's arrest, criminal prosecution, conviction, and retrial for the abduction and assault of Maureen Fournier.

A. Factual Background

On the morning of August 9, 1990, Emergency Medical Service ("EMS") found Fournier badly injured and lying in the street in the City of Detroit. EMS transported Fournier to St. John's Hospital. The medical forms completed on her admission to the hospital, as well as subsequent medical reports and testimony from her doctors, bear witness to the extreme brutality of the crime. The police determined that Fournier had been abducted from the City of Warren, brutally assaulted and raped, and left on a street in Detroit.

Because Fournier had been abducted from Warren, the matter was turned over to the Warren Police Department ("Department"), and the case was assigned to Detective Ingles. Given the extent of Fournier's injuries, officers had to wait two days before they could interview her regarding the attack. Even then, the extent of Fournier's injuries forced Detective Ingles to write questions on a board, and Fournier responded in kind.[1] During the interview, Fournier reported that she had been abducted from Warren on the night of August 8, 1990 by four Caucasian males, all of whom she knew. Fournier stated that, while she was walking down the street, she was approached by Moldowan, who was her ex-boyfriend, thrown into a white or light-colored van, and brutally beaten and raped by three of the four assailants. Fournier identified her attackers as

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[1] Detective Ingles subsequently transcribed Fournier's responses to a witness statement form, which she later signed.

Michael Cristini, Jim Cristini, Tracy Tapp ("Tapp"), and Moldowan. Fournier's sister, Colleen Corcoran ("Corcoran"), confirmed Fournier's claims that Moldowan previously had assaulted and threatened Fournier.

After completing their investigation, the police arrested and charged all four individuals. The police subsequently dropped the charges against Tapp based on his alibi that he had been in Texas for several days prior to the assault, had not returned to the Michigan until the evening of August 8, and spent the rest of the night with his girlfriend. Tapp's girlfriend confirmed his alibi.

On September 17-18, 1990, the Macomb County Circuit Court held a preliminary examination to determine whether sufficient evidence existed to proceed to trial. During that hearing, Fournier testified that, prior to the assault, she had dated and lived with Moldowan for more than a year before their relationship ended when he was arrested for assaulting her. Fournier and her sister both testified that, prior to the attack, Moldowan had been abusive toward Fournier and threatened her. In describing the assault, Fournier testified that she had been walking on 11 Mile Road in Warren when a van pulled alongside her. Fournier testified that Moldowan got out of the van, grabbed her, and dragged her into the van, where she was beaten and raped. As a result of the assault, Fournier suffered significant injuries that required extensive abdominal surgery.

Corcoran also testified at the hearing, stating that she received a call from an unidentified male on August 9, 1990, the day Fournier was found in Detroit, inquiring as to Fournier's whereabouts. Corcoran claims that she immediately recognized the caller as Moldowan. Corcoran testified that, although she knew that her sister was in the hospital, she lied and told Moldowan that her sister was at home with her, and that Moldowan then exclaimed: "No, she's not.... She's at the morgue." (J.A. 839.) Corcoran also testified that Moldowan had called her home the previous day looking for Fournier, and that Moldowan had stated that "he was going to get her." (J.A. 841-42.)

At the conclusion of the examination, the court dismissed Jim Cristini as a defendant, but bound over Moldowan and Michael Cristini on all counts. A jury trial was held from April 30 to May 10, 1991, during which Fournier and Corcoran offered substantially the same testimony they provided during the preliminary examination. Fournier also testified that she had never been in the Detroit neighborhood where EMS found her, and that she had never frequented a crack house in the area.

In addition, Dr. Alan Warnick, D.D.S., a forensic odontologist and consultant for the Wayne County Medical Examiner's Office and a consultant to Macomb County, Monroe County, and the Michigan State Police, offered expert testimony that bite marks on Fournier's neck were consistent with dental impressions taken from Moldowan, and that bite marks on Fournier's right arm and right side were consistent with Michael Cristini's dentition. In

describing his conclusions, Dr. Warnick testified that the "chances are ... 2.1 billion to 1 that another individual can make those same marks." (J.A. 2544.)

In presenting their defense, Cristini and Moldowan offered alibi witnesses who testified that the defendants were not together on the evening in question. The defense also introduced pizza delivery tickets which documented the location of the pizza deliveries Cristini had made the night of August 8, 1990, seeking to show that Cristini could not have been part of the kidnapping. The defense also presented testimony from a witness who claimed that she observed several males in the street where Fournier was found, and that the males were both Caucasian and African-American. The defense also offered expert testimony from its own forensic odontologists countering Dr. Warnick's testimony concerning the bite-mark evidence.

On rebuttal, the prosecution called Dr. Pamela Hammel, D.D.S., a colleague of Dr. Warnick, who offered testimony corroborating and supporting Dr. Warnick's conclusions.

On May 10, 1991, the jury convicted Moldowan and Cristini of kidnaping, assault with intent to commit murder, and two counts of criminal sexual conduct in the first degree. After sentencing, the court entered an order requiring that "[a]ll evidence in the custody of the Warren Police Department, the Macomb County Prosecutor's Office and the Macomb County Circuit Court[,] whether admitted into evidence or not ... [,] be preserved from this date forward until further order of the Circuit Court,

Michigan Court of Appeals, or Michigan Supreme Court." (J.A. 2613.)

After trial, a private investigator hired by Moldowan's family located a witness, Jerry Burroughs, who reported that, on the morning of August 9, 1990, he saw four African-American males standing around a naked white female who was lying in the street, and that he saw the four men leave in a light-colored van. Burroughs further recounted that, approximately one week after the assault, he overheard two of those same men talking about the incident and bragging that they had participated in the assault. Burroughs also indicated that he had seen Fournier in that neighborhood several times that summer frequenting a crack house in the area.

In addition to this new evidence, Dr. Hammel, after being approached several years later by Moldowan's appellate counsel, also recanted her testimony. Dr. Hammel explained that she initially had trouble matching the defendants' dentitions to the bite marks on Fournier's body, but that Dr. Warnick had reassured her that Dr. Norman Sperber, a highly respected forensic odontologist, had reviewed the evidence and confirmed Dr. Warnick's conclusions. After subsequently determining that Dr. Sperber had never reviewed any evidence in the case, Dr. Hammel surmised that Dr. Warnick "had been deceptive in order to mislead [her] into testifying in support of his conclusions."[2] (J.A. 2568.) In a sworn

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[2] Dr. Warnick disputes Dr. Hammel's claims and denies that he ever told Dr. Hammel that he had consulted with Dr. Sperber. Dr. Warnick also denies that Dr. Hammel ever

affidavit, Dr. Hammel stated that, had she known that Dr. Warnick's representation that Dr. Sperber had reviewed the evidence was untrue, she "would never have agreed to testify as a rebuttal witness in support of Dr. Warnick's conclusions." (J.A. 2568.)

On the basis of this new evidence and discredited testimony, Moldowan again sought review of his conviction. The Michigan Supreme Court eventually reversed Moldowan's conviction, and remanded the matter for a new trial. In particular, the Michigan Supreme Court found that "the prosecutor's two expert witnesses with respect to 'bite-mark' evidence have either recanted testimony which concluded that bite marks on the victim were made by the defendant or presented opinion evidence which has now been discredited." *Moldowan*, 643 N.W.2d at 570. The court also noted that the prosecutor conceded that "it simply is not fair to say that the defendant or defendant's counsel should have known about the problems with the bite-mark evidence prior to trial. The same can also be said with regard to the later-discovered alibi witnesses.... Without the bite-mark evidence and with the additional alibi witnesses, the result of the trial could have been different." *Id.* at 571.

On retrial, in February 2003, Moldowan was acquitted of all charges and released. All told, Moldowan spent nearly twelve years in prison.

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expressed any doubt about her conclusions prior to Moldowan's 1991 trial.

B. Procedural History of the Instant Action

On January 28, 2005, Moldowan brought this civil action asserting numerous claims under 42 U.S.C. § 1983 and Michigan state law. Moldowan ultimately filed three amended complaints. In resolving an earlier motion regarding discovery, the district court offered the following summary of the claims asserted by Moldowan in his Third Amended Complaint, the operative pleading at this juncture:

> Plaintiff's current complaint (Third Amended Complaint filed February 9, 2006) alleges a total of 36 counts against several groups of defendants: City of Warren; Police Department of City of Warren (WPD); County of Macomb and its Prosecutor in his official capacity; and sued in their individual and official capacities: Alan Warnick [forensic consultant], Donald Ingles [WPD detective], Mark Christian [WPD detective], Michael Schultz [WPD sergeant in charge of the evidence room], and "other Present and Former Members of the Warren Police Department and office of the Macomb County Prosecutor as yet unidentified," and sued individually: Maureen Fournier [the crime victim]. The case currently exceeds 200 docket entries with numerous ... discovery disputes and appeals. Extensive discovery has been conducted-lengthy depositions taken and numerous interrogatories and requests to produce exchanged.

The complaint alleges federal violations of plaintiff's civil and constitutional rights during his criminal prosecution, as well as state claims including intentional infliction of emotional distress against Ms. Fournier for her conduct in the second prosecution. Relevant to the instant motion are plaintiff's claims against the City of Warren and the Warren Police Department. With respect to these defendants, plaintiff alleges a conspiracy between Warnick and members of the Warren Police (Counts V, VI, VII, VIII), and conspiracy between Ms. Fournier and members of the Warren Police Department (Counts XVI, XVII, XVIII, XIX). Plaintiff also contends that there is liability on the part of the City of Warren and Warren Police Department for inadequate training and/or supervising of police officers regarding the constitutional rights of citizens (Count XXIV), and for the actions of defendant Ingles as the final policymaker in conducting the investigation (Count XXV). Additionally, plaintiff claims liability against the City of Warren and the Warren Police Department for the destruction of evidence in violation of a court order. He also claims that the Warren Police Department and the City of Warren are liable, along with Macomb County and its prosecutor, for the continued seizure and prosecution of plaintiff without probable cause in the second trial in violation of his constitutional rights under the Fourth Amendment (Count XXVII), and his rights to substantive due process under the

> Fourteenth Amendment (Count XXVIII), and his rights to procedural due process under the Fourteenth Amendment (Count XXIX). He also has a state claim for false imprisonment in connection with the second prosecution (Count XXXV).

Moldowan v. City of Warren, 2006 WL 3106090, at *2-3 (E.D. Mich. 2006) (alterations in original).

After extensive discovery, Defendants filed motions for summary judgment, asserting various qualified and absolute immunity defenses. Moldowan opposed those motions and cross-moved for partial summary judgment. Based on concessions made by Moldowan in his response to Defendants' motions, the district court dismissed Counts XXV, XXVII, XXVIII, and XXIX as to the City of Warren and the Warren Police Department, dismissed all claims against Officer Christian, and dismissed Count XXXII against Detective Ingles.

After receiving briefing from all parties and hearing argument on the matter, the district court denied Defendants' motions as to all remaining claims. The district court denied the County's motion on the grounds that "[t]he filing is appropriate against the County as a matter of law and certainly there are many questions of material fact for a jury to determine." (J.A. 3041.) As to the Warren Defendants' motion, the district court concluded that "[t]here are far too many questions of fact here." (J.A. 3020.) As to Dr. Warnick's motion, the court concluded that the motion "has to be denied" because "[t]here are too many facts at issue here even as to

qualified immunity to grant summary judgment." (J.A. 3065.) As to Fournier's motion, the court concluded that "[t]here are innumerable issues of fact here, particularly as to simply whether Fournier lied or not. And the Court will instruct ... that this was an intentional infliction or the jury is to decide whether there was an intentional infliction of emotional distress. I do find that the elements have been met." (J.A. 3090-91.) The court also denied Moldowan's motion for partial summary judgment.

The district court subsequently entered three written orders stating merely that Defendants' motions for summary judgment were "denied for the reasons stated on the record." (J.A. 323, 326, 328.) The district court's written order as to the Warren Defendants' motion also dismissed "all claims against the City of Warren Police Department ... for the reason that the City of Warren Police Department is not a legal entity capable of being sued." (J.A. 326.)

These three interlocutory appeals followed.

II.

Before turning to the merits of Defendants' appeals, we first must determine whether and to what extent we have jurisdiction to consider on interlocutory appeal the issues raised by the parties. On December 3, 2007, Moldowan moved this Court to dismiss each of the three interlocutory appeals, arguing that the trial court's orders do not constitute final orders appealable under 28 U.S.C. § 1291 and are not appealable under the collateral

order doctrine. By order dated March 27, 2008, a prior panel of this Court referred Moldowan's motions to this panel for resolution. Upon consideration, we hereby deny Moldowan's motions.

A. Jurisdiction under the Collateral Order Doctrine

Although 28 U.S.C. § 1291 vests this Court with jurisdiction over appeals only from "final decisions" of the district courts, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964). A decision also is appealable if it falls within "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). That "small class" of decisions is limited to orders granting or denying a claim that "cannot be effectively vindicated after the trial has occurred." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

The requirements for bringing an appeal under *Cohen*'s collateral order doctrine "have been distilled down to three conditions: that an order ' conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on

appeal from a final judgment.'" *Will v. Hallock*, 546 U.S. 345, 349, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006) (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)). In *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), the Supreme Court clarified these elements as follows:

> The requirement that the issue underlying the order be "effectively unreviewable" later on, for example, means that failure to review immediately may well cause significant harm. The requirement that the district court's order "conclusively determine" the question means that appellate review is likely needed to avoid that harm. The requirement that the matter be separate from the merits of the action itself means that review *now* is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending).

Id. at 311, 115 S.Ct. 2151 (citations omitted) (emphasis in original). The Court also has noted that "some particular value of a high order" must be "marshaled in support of the interest in avoiding trial." *Will*, 546 U.S. at 352, 126 S.Ct. 952. Thus, to take advantage of the collateral order doctrine, a party pursuing an interlocutory appeal must satisfy these three basic elements, as well as demonstrate

that the challenged order "'imperil[s] a substantial public interest.'" *Kelly v. Great Seneca Fin. Corp.*, 447 F.3d 944, 948 (6th Cir. 2006) (quoting *Will*, 546 U.S. at 353, 126 S.Ct. 952).

B. Jurisdiction in the Context of Immunity Claims

Whether we have jurisdiction to consider an issue on interlocutory appeal thus requires us to consider the three basic elements as well as whether the denial of summary judgment implicates "substantial public interests." In this case, that requires us to consider the interests implicated by the district court's denial of Defendants' qualified and absolute immunity claims in the context in which those defenses have been asserted.

1. Defendants' Qualified Immunity Claims

Generally speaking, the rationale underlying the qualified immunity doctrine is that, "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (quoting *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806. Like absolute immunity, the

qualified immunity privilege entitles a party to " *immunity from suit* rather than a mere defense to liability," and thus "is effectively lost if a case is erroneously permitted to go to trial." *Id.* (emphasis in original).

In light of these interests, the Supreme Court has concluded that the denial of a defendant's assertion of qualified immunity "easily meets" the *Cohen* requirements:

> Such a decision is "conclusive" in either of two respects. In some cases, it may represent the trial court's conclusion that even if the facts are as asserted by the defendant, the defendant's actions violated clearly established law and are therefore not within the scope of the qualified immunity. In such a case, there will be nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion that the defendant is not immune. Alternatively, the trial judge may rule only that if the facts are as asserted by the plaintiff, the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability. Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations, and because "[there] are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred," it is

> apparent that " Cohen's threshold requirement of a fully consummated decision is satisfied" in such a case. *Abney v. United States*, 431 U.S. 651, 659, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

Mitchell, 472 U.S. at 527, 105 S.Ct. 2806. Thus, pursuant to *Mitchell*, "federal appellate courts have jurisdiction to hear interlocutory appeals considering 'the legal question of qualified immunity, *i.e.*, whether a given set of facts violates clearly established law.'" *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 531 (6th Cir. 2002) (quoting *Mattox v. City of Forest Park*, 183 F.3d 515, 519 (6th Cir. 1999)); *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996).

In considering the denial of a defendant's claim of qualified immunity, however, our jurisdiction is limited to resolving pure questions of law. *See Mitchell*, 472 U.S. at 530, 105 S.Ct. 2806 (addressing denial of a claim of qualified immunity, but only "to the extent that it turns on an issue of law"). We lack jurisdiction to consider "a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 313, 115 S.Ct. 2151; *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998) ("A defendant who is denied qualified immunity may file an interlocutory appeal with this Court only if that appeal involves the abstract or pure legal issue of whether the facts alleged by the plaintiff constitute a violation of clearly established law."). In light of this jurisdictional limitation, "a district court's

determination that there exists a triable issue of fact cannot be appealed on an interlocutory basis, even when the finding arises in the context of an assertion of qualified immunity." *Gregory v. City of Louisville,* 444 F.3d 725, 742 (6th Cir. 2006). To permit an appeal in such circumstances "would interject appellate review into a district court's determination that the evidence is sufficient for trial, a nonfinal adjudication for purposes of 28 U.S.C. § 1291." *Id.* at 743. "Under *Johnson,* therefore, a determination that a given set of facts violates clearly established law is reviewable, while a determination that an issue of fact is 'genuine' is unreviewable." *See v. City of Elyria,* 502 F.3d 484, 490 (6th Cir. 2007).

This jurisdictional limitation requires that, if "the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal." *Berryman,* 150 F.3d at 563; *Meals v. City of Memphis,* 493 F.3d 720, 726-27 (6th Cir. 2007) ("[A] defendant is required to limit her argument to questions of law premised on facts taken in the light most favorable to the plaintiff."); *Sheets v. Mullins,* 287 F.3d 581, 585 (6th Cir. 2002) ("In this circuit, it is well established that, for appellate jurisdiction to lie over an interlocutory appeal, a defendant seeking qualified immunity must be willing to concede to the facts as alleged by the plaintiff and discuss only the legal issues raised by the case."). "Once a defendant's argument drifts from the purely legal into the factual realm and begins contesting what really happened, our jurisdiction ends and the case should proceed to trial." *Berryman,* 150 F.3d at 564 (finding lack of jurisdiction to

consider defendants' appeal to the extent that defendants "attempt[ed] to persuade us to believe their version of the facts"); *Harrison v. Ash,* 539 F.3d 510, 517 (6th Cir. 2008) ("Thus, to the extent that the denial of qualified immunity is based on a factual dispute, such a denial falls outside of the narrow jurisdiction of this Court.").

In *Scott v. Harris,* 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), however, the Supreme Court recognized an apparent exception to this jurisdictional limitation when it considered and rejected a district court's denial of summary judgment even though the district court had found genuine issues existed as to material facts. In reaching that conclusion, and without addressing the issue of jurisdiction, the Court found that a video of the incident rendered the plaintiff's version of the facts "so utterly discredited by the record that no reasonable jury could have believed him." *Id.* at 380, 127 S.Ct. 1769. In trying to reconcile *Scott* with the Supreme Court's edict in *Johnson,* this Court has concluded that "'where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory appeal.'"[3] *Wysong v. Heath,* 260 F. App'x 848, 853 (6th Cir. 2008) (quoting *Blaylock v. City of Philadelphia,* 504 F.3d 405, 414 (3rd Cir. 2007)).

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[3] In *Wysong*, this Court found that the plaintiff's admission in his deposition that no factual dispute existed fell within this exception and warranted reversal of the district court's finding of disputed material facts. 260 F. App'x at 853-54.

It also is important to note that a district court's stated basis for denying an immunity claim "does not necessarily foreclose this Court's jurisdiction over [a party's] appeal." *City of Elyria*, 502 F.3d at 490; *see also Christophel v. Kukulinsky*, 61 F.3d 479, 485 (6th Cir. 1995) ("A defendant's right to appeal the denial of qualified immunity does not turn on the phrasing of the district court's order."). Rather, "' *regardless of the district court's reasons* for denying qualified immunity, we may exercise jurisdiction over the ... appeal to the extent it raises questions of law." *Williams v. Mehra*, 186 F.3d 685, 689-90 (6th Cir. 1999) (quoting *Dickerson*, 101 F.3d at 1157) (emphasis in *Williams*).

After reviewing Defendants' various qualified immunity claims, we conclude that, while these appeals predominantly raise questions of law that are capable of appellate review at this juncture, they also present some issues of fact that *Johnson* dictates are beyond the scope of our jurisdiction. Where the parties ask us to resolve factual disputes, we set those issues aside for resolution by the trial court. *See Gregory*, 444 F.3d at 742-43 ("To the extent that an appellant on interlocutory appeal argues issues of fact and law on appeal, this Court will only entertain pure issues of law.").

2. Defendants' Absolute Immunity Claims

Detective Ingles, Dr. Warnick, and Fournier also challenge the district court's denial of their claims of absolute testimonial or witness immunity, which they

assert in response to those claims arising out of (or based in part on) their testimony at trial.

Unlike qualified immunity, the denial of a defense of absolute witness immunity generally is not immediately appealable because the "lack of interlocutory appeal from denials of witness immunity does not 'imperil [a] substantial public interest.'" *Kelly*, 447 F.3d at 949. Despite acknowledging that testimonial immunity "strengthens the substantial public interest of having witnesses come forward and testify truthfully," we nevertheless concluded in *Kelly* that the denial of such claims does not imperil that overarching interest because "private individuals ... will appear as witnesses, at most, only a few times in their lives." *Id.* On that basis, we reasoned that permitting a suit to proceed against "private individuals" does not implicate the same interests as an appeal from the denial of public official immunity, where the relevant interest is more significant given that "the official, by spending more time than necessary to defend himself or herself in an action, would spend less time on the tasks for which he or she was hired and cost the public additional money in defending a suit that should have been dismissed." *Id.*

Unlike the defendants before us in *Kelly*, however, the defendants asserting testimonial immunity in this case are a police officer, a forensic consultant, and the victim of a brutal crime. Moreover, each asserts immunity based on testimony delivered in the course of a criminal prosecution. In light of these factors, we conclude that the balance of interests at issue in this case differs dramatically

from the interests implicated by the denial of immunity in *Kelly*. Because *Kelly* does not dispose of the question presented here, we must determine whether the denial of an absolute witness immunity claim asserted under these particular circumstances imperils a substantial public interest. We conclude that it does.

As to Detective Ingles and Dr. Warnick, the interests implicated by the district court's denial of their testimonial immunity claims are sufficiently akin to those implicated by the denial of public official immunity to support interlocutory review. As the Court noted in *Kelly*:

> Official immunity seeks to protect the ability of an official to exercise discretion in accomplishing public tasks and to prevent the official from spending time in court defending actions that are reasonably thought to be legal. Without interlocutory appeal from district court denials of immunity, the official, by spending more time than necessary to defend himself or herself in an action, would spend less time on the tasks for which he or she was hired and cost the public additional money in defending a suit that should have been dismissed. The lack of speedy resolution of the claim also threatens the official's decisiveness in taking action while the action is proceeding to trial.

447 F.3d at 949 (citation omitted). Those same interests are at stake where, as here, a district court denies the absolute immunity claim of a police officer

or forensic investigator who testifies on behalf of the state as part of a criminal prosecution. *See Vakilian v. Shaw*, 335 F.3d 509, 515-16 (6th Cir. 2003) (considering interlocutory appeal from the denial of immunity asserted by a government investigator). Exposing police officers and forensic investigators to suit based on testimony they deliver as part of their official duties and on behalf of the state undoubtedly implicates their ability to exercise their discretion and potentially inhibits them from performing their duties.[4] Unlike the parties before us in *Kelly*, "[s]ection 1983 lawsuits against police officer witnesses, like lawsuits against prosecutors, 'could be expected with some frequency.' Police officers testify in scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the State's official

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[4] Among other things, Moldowan claims that this Court lacks jurisdiction to consider Detective Ingles' appeal because Ingles is now retired. Moldowan, however, offers no authority to support his contention that this is a relevant consideration. Moreover, Moldowan's claims against Detective Ingles arise out of testimony Ingles delivered as an active police officer with the Warren Police Department in the course of his official duties. Consequently, granting Moldowan's motion obviously will resound much further than the limits of this case. Indeed, by denying Detective Ingles' assertion of immunity with respect to Moldowan's Brady claims, the district court implicitly concluded that Brady could support a claim against a police officer who fails to disclose exculpatory materials to the prosecutor's office, as that question of law lay at the heart of those claims. That conclusion obviously has implications that reach beyond the unique circumstances of this case. Accordingly, this Court has jurisdiction to consider Detective Ingles' appeal. See *City of Elyria*, 502 F.3d at 489-90.

witnesses." *Briscoe v. LaHue,* 460 U.S. 325, 343, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) (quoting *Imbler v. Pachtman,* 424 U.S. 409, 425, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)). Furthermore, because Detective Ingles and Dr. Warnick represented the State of Michigan in the underlying criminal proceedings against Moldowan, their exposure to suit also "would cause a continuing injury to the State's dignitary interests every additional day that [its officials] must remain in federal court." *Kelly,* 447 F.3d at 949.

As to Fournier, we also conclude that the denial of her assertion of absolute immunity warrants immediate review as it would imperil substantial public interests. Although Fournier undoubtedly is a "private individual" and not a public official, the balance of interests implicated here differs significantly from those at issue in *Kelly* because the claims against her arose out of testimony she delivered as a victim witness in the course of a criminal trial.

Extending interlocutory review to the denial of a testimonial immunity claim in this context serves several important public interests. Most obviously, immunity from suit prevents witness intimidation and self-censorship. Declining interlocutory review under these circumstances would expose victims of crimes who testify in criminal proceedings to suit-including the discovery, depositions, hearings, trials, and other proceedings that attend civil actions-and thus would create a substantial disincentive for victims to come forward to identify their attackers. That concern, in turn, implicates the effective administration of the criminal justice system, which

is undoubtedly a weighty public interest. *See Briscoe*, 460 U.S. at 343, 103 S.Ct. 1108 (recognizing absolute testimonial immunity for police officers because their testimony, among other things, provides a significant "contribution to the judicial process").

This concern is all the more significant in this particular context because Fournier was the victim of a brutal sexual assault, and thus the threat of being dragged through the rigors of a civil suit based on her identification of, and testimony against, her alleged attacker would create a tremendous emotional hardship on her. Declining to consider Fournier's appeal ultimately would create a significant disincentive for other victims of rape and sexual assault to come forward and testify against their attackers. Victims of crimes, especially the types of crimes that occurred here, must feel secure that cooperating with the police will not expose them to lengthy and invasive civil proceedings. The denial of immunity imperils that interest because subjecting victim witnesses to the proceedings attendant to civil litigation potentially re-exposes them to significant emotional trauma. As Fournier's brief to this Court succinctly frames the issue: "If a woman who has been sodomized, beaten and left permanently disabled can be sued and subjected to an endless retread of the brutalization against her through deposition and discovery, the entire criminal justice system is put at risk." Fournier Br. at 22. We agree.

Moreover, as the Supreme Court has noted, it is "the right and privilege" of individuals "to aid in the execution of the laws of his country by giving information to the proper authorities of violations of

those laws," and that right "may properly be said to be secured by the Constitution and laws of the United States." *Motes v. United States*, 178 U.S. 458, 462-63, 20 S.Ct. 993, 44 L.Ed. 1150 (1900).

For these reasons, we hereby **DENY** Moldowan's motions to dismiss. The collateral order doctrine is satisfied here because Defendants' absolute and qualified immunity claims not only would be irretrievably lost if this case were to proceed to trial, but also because subjecting these particular Defendants to civil proceedings implicates substantial public interests. Again, however, we may consider Defendants' appeals only to the extent that they raise pure questions of law. *See Johnson*, 515 U.S. at 313-18, 115 S.Ct. 2151.

III.

We review the district court's denial of summary judgment *de novo*, using the same Rule 56(c) standard as the district court. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 389 (6th Cir. 2008); *Williams*, 186 F.3d at 689. Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists when there are "disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-

moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)).

At the summary judgment stage, the moving party bears the initial burden of identifying those parts of the record that demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party seeks summary judgment on an issue for which it does not bear the burden of proof at trial, however, the moving party may meet its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325, 106 S.Ct. 2548. When the moving party has carried this burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348. The non-moving party also may not rest upon its mere allegations or denials of the adverse party's pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial. *Id.*; Fed. R. Civ. P. 56(e)(2).

After the parties have presented their evidence, "the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505. In evaluating the evidence, the court must draw all inferences in the light most favorable to the

nonmoving party. *Matsushita,* 475 U.S. at 587, 106 S.Ct. 1348. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient [to defeat a motion for summary judgment]; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505.

That Defendants' motions for summary judgment were based on claims of absolute and qualified immunity does not affect the standard of review that applies. *See Gregory,* 444 F.3d at 737. Whether a defendant is entitled to absolute or qualified immunity from liability under 42 U.S.C. § 1983 is a legal question that this Court reviews *de novo. Id.* at 737, 742.

IV.

Having determined that we have jurisdiction to consider Defendants' interlocutory appeals and settled the standard of review that applies, we now turn to the merits of Defendants' claims. First, we consider the qualified and absolute immunity claims raised in Case No. 07-2115, the appeal of the City of Warren, Detective Ingles, and Officer Schultz.

A. Qualified Immunity

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Harlow, 457 U.S. at 818, 102 S.Ct. 2727. "The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" *Elder v. Holloway*, 510 U.S. 510, 514, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) (quoting *Harlow*, 457 U.S. at 806, 102 S.Ct. 2727).

In *Williams v. Mehra, supra*, this Court articulated a "tripartite" procedure for evaluating claims of qualified immunity:

> First, we determine whether a constitutional violation occurred; second, we determine whether the right that was violated was a clearly established right of which a reasonable person would have known; finally, we determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

186 F.3d at 691 (citing *Dickerson*, 101 F.3d at 1157-58). The first step in our inquiry, then, is to consider the "threshold question" whether, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* If a violation could be made out on

favorable view of the parties' submissions, however, we must then consider whether the right was "clearly established." "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* Finally, and only if these first two elements are satisfied, this Court "occasionally" has gone on to determine "'whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.'" *Drogosch v. Metcalf,* 557 F.3d 372, 378 (6th Cir. 2009) (quoting *Estate of Carter v. City of Detroit,* 408 F.3d 305, 311 n. 2 (6th Cir. 2005)).

In *Pearson v. Callahan,* --- U.S. ----, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), the Supreme Court recently reconsidered the mandatory nature of the inquiry set forth in *Saucier,* concluding that, "while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory." *Id.* at 818. Acknowledging several drawbacks to the sequence required under *Saucier,* the Court reasoned that "[t]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* Although rejecting the mandatory nature of the *Saucier* framework, the Court nevertheless recognized that applying that framework "is often beneficial." *Id.* In light of

Pearson, then, we still are required to address the same questions in conducting our qualified immunity analysis, but now we are free to consider those questions in whatever order is appropriate in light of the issues before us.

"Once the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity." *Silberstein v. City of Dayton,* 440 F.3d 306, 311 (6th Cir. 2006) (citing *Barrett v. Steubenville City Schools,* 388 F.3d 967, 970 (6th Cir. 2004)).

B. Absolute Immunity

"More limited in application, but certainly broader in protection, is absolute immunity, which the Supreme Court has held applies to the performance of certain functions when those functions are integral to the functioning of our adversarial judicial system." *Gregory,* 444 F.3d at 738 (citing *Briscoe,* 460 U.S. at 345, 103 S.Ct. 1108). In defining the scope of the absolute immunity doctrine, the Supreme Court has employed a functional test: "Those functions more 'intimately associated with the judicial phase of the criminal process' are more likely to merit careful consideration for absolute immunity. In contrast, those functions more 'investigative' in nature-searching for 'clues and corroboration'-are more removed from the judicial process and merit only qualified immunity." *Id.* (quoting *Buckley v. Fitzsimmons,* 509 U.S. 259, 269, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993)).

Unlike qualified immunity, "[t]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Buckley,* 509 U.S. at 269, 113 S.Ct. 2606.

C. Analysis

In his complaint, Moldowan seeks recovery under 42 U.S.C. § 1983 for various alleged violations of his constitutional rights. Section 1983, however, "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor,* 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (quoting *Baker v. McCollan,* 443 U.S. 137, 144 n.3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)). Consequently, to determine whether Moldowan asserts a violation of a clearly established constitutional right, it is necessary to examine the substantive rights underlying each of Moldowan's remaining requests for relief. *See Baker,* 443 U.S. at 140, 99 S.Ct. 2689 ("The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged."). That Moldowan asserts claims under various constitutional provisions does not control our inquiry. Rather, the critical question is whether the "legal norms" underlying those claims implicate clearly established constitutional rights. *See Mitchell,* 472 U.S. at 528, 105 S.Ct. 2806. For that reason, we group and address Moldowan's claims according to the conduct at issue or the legal norms that underlie his various claims.

1. Counts IX, X, XI, XII- *Brady* Claims (Ingles)

Moldowan asserts a number of claims against Detective Ingles under the Fourth, Fifth, Sixth, and Fourteenth Amendments based on Ingles' alleged failure to disclose exculpatory evidence. In particular, Moldowan contends that Ingles was required to disclose exculpatory statements from Burroughs, including that Burroughs recalled seeing four African-American males standing around Fournier on the morning that she was discovered in Detroit and that Burroughs later overheard two of those men discussing their involvement in the assault.[5]

Moldowan's allegations, although asserted under various constitutional provisions, present claims under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. 1194. The question we confront here is whether Detective Ingles' alleged suppression of Burroughs' statements violated the same "legal norm" underlying the due process violation recognized in *Brady*. We hold that it does.[6]

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[5] Although Detective Ingles disputed below whether he ever interviewed Burroughs, he concedes the issue for purposes of this appeal. Therefore, that dispute does not affect our authority to consider the purely legal questions at issue here.

[6] However, we reject Moldowan's attempt to construe these claims as substantive due process claims, as they more properly are understood as procedural due process violations. See *Brady*, 373 U.S. at 87, 83 S.Ct. 1194; *Graham*, 490 U.S. at 395, 109

Detective Ingles argues that Moldowan cannot demonstrate that the Due Process Clause imposes on the police a clearly established obligation to disclose exculpatory information. Superficially, that argument has some appeal. To the extent that *Brady* imposes an obligation on the state to disclose exculpatory evidence to the defense, courts consistently have determined that this duty falls squarely on the prosecutor, not the police. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor."); *Lindsay v. Bogle*, 92 F. App'x 165, 170 (6th Cir. 2004) (stating that "the *Brady* obligation applies only to prosecutors"). In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), for instance, the Supreme Court explained that "the individual prosecutor," who "alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *Id.* at 437, 115 S.Ct. 1555; *see also Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (recognizing "the special role played by the American prosecutor in the search for truth in criminal trials"). In fact, the Supreme Court has placed the responsibility to manage the state's disclosure obligations solely on the prosecutor despite acknowledging that "no one doubts that police

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S.Ct. 1865.

investigators sometimes fail to inform a prosecutor of all they know." *Kyles*, 514 U.S. at 438, 115 S.Ct. 1555.

This well-established rule, however, does not resolve whether the police have a concomitant or derivative duty under the constitution to turn potentially exculpatory material over to the prosecutor. In fact, Moldowan acknowledges that the duty to "disclose" exculpatory materials to defense counsel rests on the prosecutor alone, but nevertheless maintains that the police have an analogous, but just as constitutionally-significant, obligation to turn such materials over to the prosecutor's office. Underlying Moldowan's argument is the valid concern that, if the police have no constitutional obligation in this regard, then the state could sidestep its constitutionally-mandated disclosure obligations by maintaining an unstated, but nevertheless pervasive, wall of separation between the prosecutor's office and the police with regard to the existence of potentially exculpatory evidence. Ignoring the burdens that the Constitution places on the police in this context also creates a very serious risk that police officers who conceal or withhold evidence that falls within *Brady*'s ambit will never be held accountable for the independent "deprivation of any rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983, that their conduct causes.

As the concurrence correctly notes, however, the Supreme Court already has addressed the first of these concerns, at least to a certain extent, by imposing on the prosecutor "a duty to learn of any

favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555. In other words, even though the state's obligation under *Brady* is managed by the prosecutor's office, that obligation "applies to relevant evidence in the hands of the police, whether the prosecutors knew about it or not, whether they suppressed it intentionally or not, and whether the accused asked for it or not." *Harris v. Lafler*, 553 F.3d 1028, 1033 (6th Cir. 2009) (citations omitted); *Strickler*, 527 U.S. at 280-81, 119 S.Ct. 1936 (*Brady* "encompasses evidence 'known only to police investigators and not to the prosecutor'" (quoting *Kyles*, 514 U.S. at 438, 115 S.Ct. 1555)).

Contrary to Detective Ingles' suggestion, however, this does not imply that the police have no role to play in ensuring that the state complies with its obligations under *Brady*, or that the police cannot commit a constitutional violation analogous to the deprivation recognized in *Brady*. *See Banks v. Dretke*, 540 U.S. 668, 675-76, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) ("When *police or* prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." (emphasis added)). On the contrary, although the prosecutor is the state's "official representative ... in the prosecution of the case," we have recognized that the police "also play[ ] an active role in the prosecution." *Hilliard v. Williams*, 516 F.2d 1344, 1350 (6th Cir. 1975), *vacated in part*, 424 U.S. 961, 96 S.Ct. 1453, 47 L.Ed.2d 729, *aff'd on remand*, 540 F.2d 220 (6th Cir. 1976); *see also Walker v. Lockhart*, 763 F.2d 942, 958 (8th Cir. 1985) ("Police are treated as an arm of the

prosecution for *Brady* purposes."). Because the prosecutor's office generally lacks its own investigative machinery, prosecutors often are entirely dependent on the police to turn over the fruits of their investigation. As a result of this interdependence, the police play a different, but no less significant role in the state's "search for truth in criminal trials." *Strickler*, 527 U.S. at 281, 119 S.Ct. 1936.

Because prosecutors rely so heavily on the police and other law enforcement authorities, the obligations imposed under *Brady* would be largely ineffective if those other members of the prosecution team had no responsibility to inform the prosecutor about evidence that undermined the state's preferred theory of the crime. As a practical matter then, *Brady*'s ultimate concern for ensuring that criminal defendants receive a "fundamentally fair" trial, *see United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (explaining that the "purpose" of the *Brady* rule is "to ensure that a miscarriage of justice does not occur"), demands that " *Brady*'s protections also extend to actions of other law enforcement officers such as investigating officers," *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008). Although this Court has not yet directly addressed the issue, a number of our decisions support this conclusion. *See, e.g., Gregory*, 444 F.3d at 743-45 (dismissing appeal from denial of qualified immunity in the context of *Brady* claims against police officers and forensic medical examiners); *Spurlock v. Satterfield*, 167 F.3d 995, 1005-06 (6th Cir. 1999) (relying on *Brady* to conclude that plaintiff had raised claims against a police officer that

implicated clearly established constitutional rights); *cf. Sutkiewicz v. Monroe County Sheriff,* 110 F.3d 352, 361 (6th Cir. 1997) (finding sheriff's department's failure to turn patently exculpatory information over to the prosecutor resulted in "substantial injustice" which warranted a new trial).

In addition to this practical justification, it is evident that the constitutional principles recognized in *Brady* apply just as equally to similar conduct on the part of police, and thus support our recognizing that the police can commit a constitutional deprivation analogous to that recognized in *Brady* by withholding or suppressing exculpatory material. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *Lisenba v. California,* 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."). The "overriding concern" in defining the contours of the state's disclosure obligations under the Due Process Clause, therefore, must be "the justice of the finding of guilt." *United States v. Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). As far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather than the prosecutor suppresses exculpatory evidence because, in either case, the impact on the fundamental fairness of the defendant's trial is the same.

Although the prosecutor undoubtedly plays a "special role" in "the search for truth in criminal trials," *Strickler*, 527 U.S. at 281, 119 S.Ct. 1936, the police also play a unique and significant role in that process, and thus also are bound by the government's constitutional obligation to "ensure that a miscarriage of justice does not occur," *Bagley*, 473 U.S. at 675, 105 S.Ct. 3375. As the Fourth Circuit explained persuasively in *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964):

> The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure ... The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused.

Id. at 846. In other words, because the police are just as much an arm of the state as the prosecutor, the police inflict the same constitutional injury when they hide, conceal, destroy, withhold, or even fail to disclose material exculpatory information.[7]

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[7] Although the concurrence acknowledges that the fundamental concern of the Due Process Clause is to ensure "the fairness of criminal trials," Op. at 402, it loses sight of the fact that the conduct of the police can jeopardize the fairness of a criminal trial just as much as that of the prosecutor.

While the concurrence is correct that the Supreme Court has held that, technically speaking, the government's "*disclosure*" obligations fall to and must be managed by the prosecutor, *Kyles,* 514 U.S. at 437, 115 S.Ct. 1555 (emphasis added), that argument overlooks that the Court's decisions also make clear that the constitutional concerns underlying *Brady* reach more broadly to preclude other governmental "authorities" from making a "calculated effort to circumvent the disclosure requirements established by *Brady* [ ] and its progeny," *Trombetta,* 467 U.S. at 488, 104 S.Ct. 2528. As Judge Murnaghan succinctly explained in his dissent in *Jean v. Collins,* 221 F.3d 656 (4th Cir. 2000) (en banc):

> Of course, the manner in which prosecutors and police officers comply with Brady is different, reflecting their different functions in the criminal justice system. Police officers do not disclose evidence to criminal defendants directly. Instead, the police accumulate evidence and then ministerially deliver it to the prosecutor. The prosecutor then makes a discretionary legal judgment about whether the evidence is material and exculpatory, such that Brady compels its disclosure to the defendant.

Id. at 664. Although the police and prosecutor play different roles in this process, "[t]his functional differentiation ... should not obscure the fact that Brady creates a singular constitutional duty, which prosecutors and police officers are capable of breaching in factually different ways." *Id.*

In addition to these practical justifications and constitutional considerations, the police's obligation to turn over material and exculpatory evidence also follows inexorably from the Supreme Court's recognition that the police have a constitutional duty to preserve such evidence. In *Trombetta,* the Supreme Court observed that "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." 467 U.S. at 488, 104 S.Ct. 2528. The Court recognized that same duty in *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), confirming that the Constitution imposes at least a limited "obligation" on the police "to preserve evidence ... [that] could form the basis for exonerating the defendant." *Id.* at 58, 109 S.Ct. 333. If the Constitution imposes a "duty" and "obligation" on the police to preserve such evidence, that duty, no matter how limited, certainly must preclude the police from concealing that exact same information from the prosecutor, the defense, and the courts. Why else would the police be required to *preserve* such evidence if they had no attendant obligation to *reveal* its existence? *Brady* and *Trombetta* would impose hollow obligations indeed if the Constitution did not also preclude police officers from concealing the same evidence that they are not permitted to destroy and that the prosecutor is required to disclose.

The concurrence argues that the police cannot share in the state's obligations under *Brady* because "the *Brady* duty is uniquely tailored to prosecutors" in that it requires the disclosure of exculpatory evidence that is constitutionally "material," and thus

requires the exercise of "a judgment that prosecutors, not police officers, are trained to make." [8] Op. at 402. This argument misses the point. We agree that determining whether a particular piece of evidence is "material," as defined in *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375, generally requires the exercise of legal judgment that the prosecuting attorney is better trained, not to mention better positioned, to make. *See Kyles*, 514 U.S. at 437, 115 S.Ct. 1555. However, that implies only that the prosecutor should be assigned the responsibility of determining what evidence ultimately should be *disclosed* to the defendant; it does not imply, as our colleague suggests, that the police cannot be expected to recognize and determine what evidence should be

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[8] In making this argument, the concurrence relies heavily on Judge Wilkinson's concurring opinion in *Jean v. Collins*, but does not even attempt to wrestle with Judge Murnaghan's persuasive response to that argument:

> This observation is a strawman that confuses the crucial issue. It presupposes that when a police officer discloses evidence to a prosecutor, the act is functionally identical to the discretionary legal judgment prosecutors make when disclosing evidence directly to criminal defendants. In reality, the two acts are incommensurable. Requiring police officers to disclose evidence to prosecutors does not require technical legal expertise because the act is essentially ministerial, not discretionary. The police officer's duty is not to determine whether the evidence is material and exculpatory. His duty is simply to collect the evidence and to disclose all of it to the prosecutor, who then makes the discretionary legal judgment about its material, exculpatory attributes.

221 F.3d at 669 (Murnaghan, J., dissenting).

preserved and turned over to the prosecutor. On the contrary, the Supreme Court already has assumed as much in concluding that the police have a constitutionally-significant "duty" to "preserve evidence ... that might be expected to play a significant role in the suspect's defense." *Trombetta,* 467 U.S. at 488-89, 104 S.Ct. 2528 (holding that the police were not obliged to preserve evidence because the "exculpatory value" of the evidence was not "apparent"). If the police can be expected to recognize what evidence must be preserved, certainly it is not too burdensome to demand that they simply turn that same information over to the prosecutor's office.

For most of the same reasons we have laid out here, virtually every other circuit has concluded either that the police share in the state's obligations under *Brady,* or that the Constitution imposes on the police obligations analogous to those recognized in *Brady.*[9] *See, e.g., Brady v. Dill,* 187 F.3d 104, 114 (1st Cir. 1999) ("One standard police function is to provide information to the prosecutor and the courts. Thus, a police officer sometimes may be liable if he fails to apprise the prosecutor or a judicial officer of known exculpatory information."); *Hart v. O'Brien,* 127 F.3d 424, 446-47 (5th Cir. 1997) ("[A] plaintiff states a section 1983 claim against a police officer who, after learning of 'patently exculpatory evidence,' deliberately fails to disclose it to the prosecutor."

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[9] "[W]hile analogous decisions from our sister circuits are not binding, we have repeatedly recognized their persuasive authority." See *Ass'n of Cleveland Fire Fighters v. City of Cleveland,* 502 F.3d 545, 553 n. 6 (6th Cir. 2007).

(citation omitted)); *McMillian v. Johnson,* 88 F.3d 1554, 1569 (11th Cir. 1996) ("Our case law clearly established that an accused's due process rights are violated when the police conceal exculpatory or impeachment evidence.") (collecting cases); *Walker v. City of New York,* 974 F.2d 293, 299 (2d Cir. 1992) ("The police satisfy their obligations under *Brady* when they turn over exculpatory evidence to the prosecutors."); *Geter v. Fortenberry,* 882 F.2d 167, 171 (5th Cir. 1989) (affirming denial of qualified immunity for police officer defendant with respect to plaintiff's claim that the officer failed to disclose exculpatory evidence); *Jones v. City of Chicago,* 856 F.2d 985, 995 (7th Cir. 1988) (" *Brady v. Maryland* does not require the police to keep written records of all their investigatory activities; but attempts to circumvent the rule of that case by retaining records in clandestine files deliberately concealed from prosecutors and defense counsel cannot be tolerated."). As this litany of cases indicates, the courts consistently have rejected the notion that the police have no role to play in carrying out the state's constitutionally-mandated obligations in this area. Although the prosecutor's office bears primary responsibility for carrying out the state's actual "disclosure" obligations under *Brady,* the police bear, as the Eighth Circuit has put it, an equally important " *Brady*-derived" responsibility to turn over potentially exculpatory evidence to the prosecutor's office. *White,* 519 F.3d at 814. Semantic quibbles aside, there is no doubt that the police are just as capable of depriving criminal defendants of a fundamentally fair trial by suppressing exculpatory evidence.

Having determined that the due process guarantees recognized in *Brady* also impose an analogous or derivative obligation on the police, we next must determine whether that obligation was "clearly established" as of the date of Detective Ingles' alleged violation of that duty. In determining whether a right is clearly established, we "may rely on decisions of the Supreme Court, decisions of this court and courts within this circuit, and in limited instances, on decisions of other circuits." *Spurlock*, 167 F.3d at 1006; *Ohio Civil Serv. Employees Assoc. v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). In evaluating the relevant case law, we must determine whether the right has been recognized "in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In other words, "the unlawfulness must be apparent." *Id.*

Decisions from other circuits recognizing the type of " *Brady*-derived" claims that Moldowan asserts here date back as far as 1964. *See Barbee*, 331 F.2d at 846. In fact, at least three circuits recognized prior to August 1990, the earliest possible date for Detective Ingles' involvement in the case, that this right was clearly established. *See, e.g., id.; Geter*, 882 F.2d at 171; *Jones*, 856 F.2d at 995. Although our recognition of this type of a claim is more recent and less specific, the overwhelming number of decisions from other circuits recognizing this type of claim satisfies us that any reasonable police officer would know that

suppressing exculpatory evidence was a violation of the accused's constitutional rights.

Having determined that Moldowan's claims against Detective Ingles implicate a clearly established constitutional right, we next must determine whether, taking the facts alleged by Moldowan as true, Moldowan can make out a violation of this right. At Moldowan's retrial, Jerry Burroughs testified that he witnessed four African-American males standing in the street around Fournier's body in the early morning hours of August 9, 1990. Burroughs also testified that he witnessed one of the men kick her, and that shortly thereafter he saw the men drive away from the scene in a light-colored van. Burroughs also testified that he later overheard two of the men he saw standing around Fournier's body talking about the incident and claiming involvement in the assault. Burroughs testified that he reported this information to a police officer, but the officer "just acted like I[was] saying nothing." (J.A. 2157.) Although Burroughs could not remember the name of the officer with whom he spoke, Moldowan claims that it must have been Detective Ingles. It is without question that Detective Ingles did not report any such information to the Macomb County Prosecutor, or to defense counsel for that matter.

Construing these facts in the light most favorable to Moldowan, it is evident that Burroughs' statements cast serious doubt on, if not entirely discredit, Fournier's identification of Moldowan as one of her attackers, an issue that undoubtedly was one of the most important elements of the state's

case. Burroughs' statements thus should have been disclosed to the defense as they undoubtedly "would tend to exculpate" Moldowan. *See Brady*, 373 U.S. at 88, 83 S.Ct. 1194.

Defendants contend that, even if we were to conclude that the legal norms underlying *Brady* can support an analogous or derivative claim against a police officer, Moldowan cannot prevail on the facts presented here because he cannot show that Detective Ingles withheld these statements in "bad faith." In particular, Defendants argue that, in *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), and *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 677, 88 L.Ed.2d 662 (1986), the Supreme Court held that the Due Process Clause is not "triggered by lack of due care" by government officials, *Daniels*, 474 U.S. at 333, 106 S.Ct. 662, and thus "where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required," *Davidson*, 474 U.S. at 347, 106 S.Ct. 668.

Although this Court has not addressed the issue directly, *see Gregory*, 444 F.3d at 743-44, at least two of our sister circuits have suggested that, in order to assert such a claim against the police, at least under § 1983, a defendant-turned-plaintiff must demonstrate that the police acted in "bad faith." *See, e.g., Porter v. White*, 483 F.3d 1294 (11th Cir. 2007) ("hold[ing] that the no-fault standard of care *Brady* imposes on prosecutors in the criminal or habeas context has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process"); *Villasana*

v. Wilhoit, 368 F.3d 976, 980 (8th Cir. 2004) ("[T]he recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial."). At least one other circuit, however, previously held that no such showing of bad faith is required:

> Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. 'The cruelest lies are often told in silence.' If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging.

Barbee, 331 F.2d at 846.[10]

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[10] It is unclear whether the rule announced in *Barbee* remains good law after *Jean v. Collins*. Because the en banc Fourth Circuit was "equally divided" in *Jean*, it issued a per

The question we have before us is a difficult one, with, as the concurrence rightfully points out, significant policy implications on both sides. But our job is not to craft the law to fit our policy views, it is to determine what the law requires. Notwithstanding the concurrence's argument to the contrary, the cases in this area clearly establish that police actions taken in bad faith are not the only species of police conduct that can deprive criminal defendants of the due process guaranteed by the Constitution. We acknowledge that a number of courts, including the Supreme Court, have held that a showing of bad faith is required to prevail on a claim that the police deprived a defendant of due process by concealing or withholding evidence that is only "potentially useful." But, where the police are aware that the evidence in their possession is exculpatory, the Supreme Court's decisions in this area indicate that the police have an *absolute* duty to preserve and disclose that information. The critical issue in determining whether bad faith is required thus is not whether the evidence is withheld by the prosecutor or the police, but rather whether the exculpatory value of the evidence is "apparent" or not.

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curiam order affirming the judgment of the district court without opinion. *See* 221 F.3d at 658. Although Judge Wilkinson's concurring opinion ignores the holding of *Barbee* and asserts that bad faith is required in this context, see id. at 660 ("[I]t would be impermissible to hold the police liable for due process violations under § 1983 where they have acted in good faith."), that position did not garner the support of a majority of the en banc Fourth Circuit.

In *Agurs,* for instance, the Court held that prosecutors are required to turn over to the defense evidence that was "so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce" even without a defense request. 427 U.S. at 107, 96 S.Ct. 2392. The Court explained that the constitutional violation arose not because of the title of the government official that withheld the evidence, but rather because the failure to turn over such evidence "deprived the defendant of a fair trial." *Id.* at 108, 96 S.Ct. 2392. As the Court explained: "Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.* at 110, 96 S.Ct. 2392.

In other words, the critical issue in determining whether government conduct deprived a criminal defendant of a fair trial is the nature of the evidence that was withheld; it emphatically is not the mental state of the government official who suppressed the evidence. That the due process inquiry is concerned with the nature of the evidence rather than the good or bad faith of the state actor reflects, as the Court emphasized, the Due Process Clause's "overriding concern with the justice of the finding of guilt." *Id.* at 112, 96 S.Ct. 2392; *accord Napue v. Illinois,* 360 U.S. 264, 270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (holding that the knowing use of perjured testimony violates the Due Process Clause even when "the district attorney's silence was not the result of guile or a desire to prejudice ... *for its impact was the same,* preventing, as it did, a trial that could in any real

sense be termed fair" (citation omitted) (emphasis added)). That same reasoning is reflected in *Brady*'s holding that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or punishment, *irrespective* of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1194 (emphasis added). Although both *Agurs* and *Brady* involved due process violations by the prosecutor rather than the police, the critical lesson of those decisions is that the constitutional violation arose because of the nature of the evidence, not the state of mind of the state actor. *See Strickler*, 527 U.S. at 288, 119 S.Ct. 1936 ("[U]nder Brady an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.").

Notwithstanding the reasoning underlying *Agurs* and *Brady*, the concurrence contends that Moldowan's due process claim should be evaluated under the "bad-faith standard" set forth in *Arizona v. Youngblood*, which the concurrence insists "requires proof that the officer engaged in 'a conscious effort to suppress exculpatory evidence.'" Op. at 405 (quoting *Trombetta*, 467 U.S. at 488, 104 S.Ct. 2528). This heightened standard is justified, the concurrence argues, because extending *Brady*'s "absolute duty" to law enforcement officers who do not enjoy absolute immunity will "unleash" a flood of lawsuits "that will be very difficult to stop short of trial." Op. at 403. We respectfully disagree.

However, *Youngblood* does not impose a bad faith requirement on any and all due process claims

brought against police officers. On the contrary, just like *Brady* and *Agurs*, the Court's decision in *Youngblood* confirms that where "material exculpable evidence" is concerned, the mental state of the government official withholding that evidence is not relevant to determining whether a due process violation has occurred. 488 U.S. at 57-58, 109 S.Ct. 333. In discussing the scope of the police's duty to preserve evidence, the Court contrasted the state's absolute obligation to *disclose* "material exculpable evidence" with its much more limited obligation to *preserve* "potentially useful evidence," holding that a showing of bad faith was required to show a constitutional violation only in the latter context. *Id.* at 57-58, 109 S.Ct. 333. Although, as the concurrence correctly points out, the Court rejected the bad-faith requirement in the context of due process guarantees "as interpreted in *Brady*," that turn of phrase does not bear the weight that our colleague places on it. Far from suggesting that the difference in the applicable standards turns on the job title of the government official who destroyed or concealed the evidence in question, the Court's decision in *Youngblood* actually explained:

> Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process

> Clause, as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. at 57-58, 109 S.Ct. 333 (citations omitted). In other words, *Youngblood* confirms that the "reason for the difference" in the applicable standards is the nature of the evidence at issue, not the title of the government official or whether the challenged conduct relates to the state's failure to disclose evidence rather that its failure to preserve it. *See Illinois v. Fisher,* 540 U.S. 544, 549, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004) (explaining that "the applicability of the bad-faith requirement in *Youngblood* depended ... on the distinction between 'materially exculpatory' evidence and 'potentially useful' evidence"); *United States v. Wright,* 260 F.3d 568, 570 (6th Cir. 2001) ("Separate tests are applied to determine whether the government's failure to preserve evidence rises to the level of a due process violation in cases where material exculpatory evidence is not accessible versus cases where 'potentially useful' evidence is not accessible.").

Unlike the destruction or concealment of merely "potentially useful" evidence, the loss of "materially exculpatory" evidence directly threatens the fundamental fairness of a criminal trial, and thus undoubtedly implicates the Due Process Clause. In "that class of cases," *Youngblood* says, "the interests of justice" simply impose a higher burden on state actors, including the police. 488 U.S. at 58, 109 S.Ct. 333. That is true regardless of whether the defendant is asserting a failure-to-preserve or a failure-to-disclose claim, and regardless of whether the claim is being asserted against the prosecutor or the police. *See United States v. Branch,* 537 F.3d 582, 589 (6th Cir. 2008) (stating, in the context of a claim against a police officer, that "[t]he failure to preserve material exculpatory evidence violates the defendant's right to due process regardless of whether the government acted in bad faith"); *Wright,* 260 F.3d at 570 (stating, in the context of a claim against a fire investigator, that "[t]he destruction of material exculpatory evidence violates due process regardless of whether the government acted in bad faith").

Indeed, the only way to make sense of this critical passage from *Youngblood* is to read the phrase "the police's obligation" in the last sentence as referring to the statement from the previous sentence regarding the police's "undifferentiated and absolute duty." When given a proper reading, *Youngblood* thus confirms that the police have "an undifferentiated and absolute duty to retain and preserve" certain evidence, but that "[absolute] obligation" is limited to "those cases in which the police themselves by their

conduct indicate that the evidence could form a basis for exonerating the defendant."[11]

Simply put, where the evidence withheld or destroyed by the police falls into that more serious category, the defendant is not required to make any further showing regarding the mental state of the police. *See Wright,* 260 F.3d at 573 (Gilman, J., concurring) ("Thus, the first part of the *Jobson* test-

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[11] Our reading of Youngblood also finds support in the case law of our sister circuits. In *Olszewski v. Spencer*, 466 F.3d 47 (1st Cir. 2006), for instance, the First Circuit declined to resolve this issue, but observed that "[a] variety of other circuits have considered the relationship between *Trombetta* and *Youngblood* and have concluded that (1) the destruction of 'apparently exculpatory' evidence does not require a showing of bad faith but that (2) if the evidence is only 'potentially useful,' a bad-faith showing is required." Id. at 56, 109 S.Ct. 333 (citing *United States v. Moore*, 452 F.3d 382, 388 (5th Cir. 2006)) ("impermissibly withheld evidence must be either (1) material and exculpatory or (2) only potentially useful, in combination with a showing of bad faith on the part of the government"); *United States v. Estrada*, 453 F.3d 1208, 1212-13 (9th Cir. 2006) (only requiring a showing of bad faith when the evidence is "potentially exculpatory, as opposed to apparently exculpatory"); *Bullock v. Carver*, 297 F.3d 1036, 1056 (10th Cir. 2002) ("A defendant can obtain relief under the Due Process Clause when he can show that a police department destroyed evidence with 'an exculpatory value that was apparent before [it] was destroyed.' ... Where, however, the police only failed to preserve 'potentially useful' evidence that might have been exculpatory, a defendant must prove that the police acted in bad faith by destroying the evidence." (internal citations omitted)). Although the decisions of the Fifth, Ninth, and Tenth Circuits are not binding, they lend strong support to our interpretation of this passage from *Youngblood.*

good or bad faith-should be irrelevant once the last two parts of the *Jobson* test are shown, because the Supreme Court has expressly held that the determination of good or bad faith is irrelevant for materially exculpatory evidence."). As the Court explained in *Youngblood,* "[t]he presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 56 n. *, 109 S.Ct. 333.

By overlooking this critical distinction, the concurrence misinterprets the nature of the due process inquiry required under these circumstances. In *Trombetta,* the Supreme Court suggested, as explained above, that government "authorities" run afoul of the Constitution when they make "a calculated effort to circumvent the disclosure requirements established by *Brady v. Maryland* and its progeny." 467 U.S. at 488, 104 S.Ct. 2528. The Court also observed in that case that "[t]he record contains no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence." *Id.* Emphasizing these scattered statements, the concurrence argues that a § 1983 plaintiff asserting *any* due process claim against the police is required to demonstrate bad faith. If the concurrence means by "bad faith" anything more than that the police were aware of the exculpatory value of the evidence at issue, however, then we respectfully disagree.

What the concurrence overlooks is that *Trombetta* involved evidence that was only potentially useful to the defense, not evidence that

was demonstrably exculpatory.[12] *Id.* at 489, 104 S.Ct. 2528 (concluding that the evidence in question did not satisfy the "materiality" requirement because its "exculpatory value" was not "apparent before the evidence was destroyed"); *see also Youngblood,* 488 U.S. at 60, 109 S.Ct. 333 (Stevens, J., concurring) ("In *Trombetta,* this Court found no due process violation because 'the chances [were] extremely low that preserved [breath] samples would have been exculpatory.'" (quoting *Trombetta,* 467 U.S. at 489, 104 S.Ct. 2528) (alterations in original)). In fact, the Court's decision in *Trombetta* even makes clear that the "constitutional materiality" of the withheld evidence simply is "more important[ ]" than whether the police acted in good or bad faith. 467 U.S. at 488, 104 S.Ct. 2528; *see also Youngblood,* 488 U.S. at 65, 109 S.Ct. 333 (Blackmun, J., dissenting) ("The determination in *Trombetta* that the prosecution acted in good faith and according to normal practice merely prefaced the primary inquiry, which centers on the 'constitutional materiality' of the evidence itself.").

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[12] Even the decisions from the Eighth Circuit on which the concurrence relies involved evidence that was only potentially useful. See *White,* 519 F.3d at 814 (" Brady's protections also extend to actions of other law enforcement officers such as investigating officers. However, an investigating officer's failure to preserve evidence potentially useful to the accused or their [sic] failure to disclose such evidence does not constitute a denial of due process in the absence of bad faith."); *Villasana,* 368 F.3d at 979 (observing that the documents at issue "had neither exculpatory nor impeachment value").

The policy risks imagined by the concurrence also stem from this fundamental misunderstanding of the "absolute" nature of the *Brady* obligation.[13] In *Bagley*, the Court explained that "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." 473 U.S. at 675, 105 S.Ct. 3375; *see also Agurs*, 427 U.S. at 108, 96 S.Ct. 2392 ("But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."). In other words, the Due Process Clause imposes an "absolute duty" on the prosecutor only with regard to certain evidence, *i.e.* "material exculpatory evidence." *See Youngblood*, 488 U.S. at 57, 109 S.Ct. 333.

The central lesson of all of these cases is that the critical factor in determining whether the state's obligation is "absolute" turns on the nature of the evidence at issue, not who destroyed or suppressed the evidence. The justification for imposing an absolute duty where material and exculpatory evidence is at issue is clear enough: the failure to

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[13] We also are highly skeptical of the concurrence's dire warnings that rejecting the bad-faith standard in this context will increase significantly the number of lawsuits against the police given that this circuit already has rejected the notion that bad faith is required to assert other due process claims against the police, including claims alleging that the police failed to preserve material exculpatory evidence. *See Branch*, 537 F.3d at 589; *Wright*, 260 F.3d at 570.

preserve or disclose such evidence directly threatens the "fundamental fairness" of a defendant's criminal trial. *See Youngblood,* 488 U.S. at 58, 109 S.Ct. 333; *Trombetta,* 467 U.S. at 485, 104 S.Ct. 2528; *Lisenba,* 314 U.S. at 236, 62 S.Ct. 280. Because that concern for fundamental fairness is just as strong where a defendant claims that the police destroyed or suppressed material evidence, *see Branch,* 537 F.3d at 589, there is no constitutionally-supportable basis for applying a different standard and requiring courts to inquire into the mental state of the police.

The only difference in the requisite inquiry is that, where the police are concerned, the "exculpatory value" of the evidence must be "apparent." [14] *Trombetta,* 467 U.S. at 489, 104 S.Ct. 2528. This additional burden, however, merely reflects that materiality is a legal question that the police are not trained to make, and thereby accounts for the practical concern that the police cannot be held accountable for failing to divine the materiality of every possible scrap of evidence.[15] *See Youngblood,*

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[14] In *Youngblood,* the Court suggested that this additional burden was satisfied where "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." 488 U.S. at 58, 109 S.Ct. 333.

[15] To whatever limited extent our colleague's policy concerns are justified, we think that the ultimate result is not that the police will be held liable under § 1983 more often, but rather that the police simply will opt to turn over more information to the prosecutor's office in an attempt to minimize their potential exposure to such suits. *See Agurs,* 427 U.S. at 108, 96 S.Ct. 2392 ("Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire

488 U.S. at 58, 109 S.Ct. 333. It does not imply, however, that the police are entirely shielded from liability unless a defendant shows "bad faith." Where the exculpatory value of a piece of evidence is "apparent," the police have an *unwavering* constitutional duty to preserve and ultimately disclose that evidence. [16] The failure to fulfill that obligation constitutes a due process violation,

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record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure."). Although policy considerations do not factor into our decision, we note that this is an outcome that should be encouraged given that prosecutors, not the police, should be making the decision about what evidence must be disclosed to the defense. See *United States v. Leon*, 468 U.S. 897, 900-901, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (recognizing overarching "goal" of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth'") (quoting *Alderman v. United States*, 394 U.S. 165, 175, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969)). After considering both perspectives, we conclude that the policy considerations favor our approach because providing prosecutors a fuller picture of the evidence in any given case will allow them to make more informed decisions about whether to disclose or withhold a particular piece of evidence, which undoubtedly is a goal that should be encouraged. *See Kyles*, 514 U.S. at 439, 115 S.Ct. 1555 ("This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be." (citation omitted)).

[16] Contrary to the concurrence's dire predictions, imposing this obligation on the police does not create a significant, or even additional, burden. On the contrary, the Court already has concluded that it is reasonable to expect that the police can recognize and preserve evidence that "might be expected to play a significant role in the suspect's defense." *Trombetta*, 467 U.S. at 488, 104 S.Ct. 2528. Asking the police simply to disclose that same evidence to the prosecutor is no great burden.

regardless of the whether a criminal defendant or § 1983 plaintiff can show that the evidence was destroyed or concealed in "bad faith." The reason no *further* showing of animus or bad faith is required is that, where the police have in their possession evidence that they know or should know "might be expected to play a significant role in the suspect's defense," *Trombetta*, 467 U.S. at 488, 104 S.Ct. 2528, the destruction or concealment of that evidence can *never* be done "in good faith and in accord with their normal practice," *Killian v. United States*, 368 U.S. 231, 242, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961). Consequently, requiring a criminal defendant or § 1983 plaintiff to show a "conscious" or "calculated" effort to suppress such evidence would be superfluous.[17]

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[17] Nor is there any justification for imposing a higher burden because Moldowan asserts his due process claim in the § 1983 context. *See Parratt v. Taylor*, 451 U.S. 527, 534, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) ("Nothing in the language of § 1983 . . . limits the statute solely to intentional deprivations of constitutional rights."); see also id. at 535, 101 S.Ct. 1908 ("[Section] 1983 affords a civil remedy for deprivations of federally protected rights ... without any express requirement of a particular state of mind."). Although the Court's decision in Daniels overruled other aspects of *Parratt*, it expressly left undisturbed *Parratt's* holding as to § 1983. *See Daniels*, 474 U.S. at 329-30, 106 S.Ct. 662 ("In *Parratt v. Taylor*, we granted certiorari ... to decide whether mere negligence will support a claim for relief under § 1983.... We concluded that § 1983, unlike its criminal counterpart, 18 U.S.C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. We adhere to that conclusion." (internal quotations and citations omitted)).

In any event, even if we were inclined to believe that bad faith was required, we still would not conclude that Detective Ingles is entitled to summary judgment. Because we must read the record in the light most favorable to Moldowan, we conclude that Burroughs' testimony, taken as a whole, provides sufficient evidence for Moldowan's claims to survive summary judgment because a jury could reasonably conclude that Detective Ingles acted in bad faith. Although there is no direct evidence that Detective Ingles acted intentionally in withholding these exculpatory statements, Burroughs' testimony, at least when viewed in the light most favorable to Moldowan, provides sufficient evidence for Moldowan's claim to survive summary judgment. Despite Detective Ingles' insistence to the contrary, we lack the jurisdiction to consider his claim that Burroughs never made any such statements to the police. *See Gregory,* 444 F.3d at 744-45 ("By arguing that the evidence establishes at most a negligent performance of her duties, [defendant] is arguing disputed issues of fact to this Court. We cannot entertain [defendant's] arguments going to disputed issues of material fact on this interlocutory appeal.").

Detective Ingles also suggests that Moldowan cannot prevail on his *Brady* claims because he cannot demonstrate prejudice. *See Strickler,* 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) ("[S]trictly speaking, there is never a real ' *Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."). That issue, however, also involves disputed

issues of fact which are beyond our reach at this juncture. *Johnson,* 515 U.S. at 313-18, 115 S.Ct. 2151; *Gregory,* 444 F.3d at 744.

2. Counts XIII, XIV, and XV-Perjury (Ingles)

Moldowan also asserts claims against Detective Ingles under the Fifth, Sixth, and Fourteenth Amendments based on Moldowan's allegation that, during the first trial, Ingles "committed perjury by testifying that he had prepared statements regarding any evidence that was relevant to the case, when, in fact, he had failed to reduce Mr. Burroughs['] exculpatory statement to a written report." (J.A. 293.) Detective Ingles responds that he is entitled to absolute immunity for any testimony he offered at trial. We agree.

Although government officials enjoy only qualified immunity as to their pretrial conduct, "all witnesses-police officers as well as lay witness-are absolutely immune from civil liability based on their trial testimony in judicial proceedings." *Briscoe,* 460 U.S. at 328, 103 S.Ct. 1108. A witness is entitled to testimonial immunity "no matter how egregious or perjurious that testimony was alleged to have been." *Spurlock,* 167 F.3d at 1001. Moreover, "the mere fact that plaintiffs may allege a conspiracy to render false testimony, as opposed to simply alleging that one person testified falsely at trial, does not waive absolute testimonial immunity." *Id.* Accordingly, Detective Ingles is entitled to absolute immunity for the testimony he offered at trial. That protection, however, does not extend to Ingles' non-testimonial

conduct, "despite any connection these acts might have to later testimony." *Gregory,* 444 F.3d at 739.

In his complaint, as well as before this Court, Moldowan asserts that Detective Ingles cannot assert absolute testimonial immunity because he is the "complaining witness." Although there is a well-established exception to the doctrine of absolute testimonial immunity "insofar as [an official] performed the function of a complaining witness," *Kalina v. Fletcher,* 522 U.S. 118, 131, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997); *see also Malley v. Briggs,* 475 U.S. 335, 340-41, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), that exception does not extend to testimony delivered at trial. *See Vakilian,* 335 F.3d at 516 (distinguishing between an officer's role as a "complaining witness" and a "testifying witness"); *Spurlock,* 167 F.3d at 1003-04 (distinguishing between testimonial and pre-trial conduct). As with any witness, police officers enjoy absolute immunity for any testimony delivered "at adversarial judicial proceedings." *Gregory,* 444 F.3d at 738.

Because Moldowan's perjury claims are based entirely on Detective Ingles' trial testimony rather than conduct related to his role as the "complaining witness," Ingles is entitled to absolute immunity. This is true regardless of whether he previously signed the arrest warrant as the complaining witness. Detective Ingles therefore is entitled to summary judgment as to Counts XIII, XIV, and XV.

3. Count XXXI-Malicious Prosecution (Ingles)

In Count XXXI, Moldowan asserts a state law claim against Detective Ingles for malicious prosecution. Under Michigan law, in order to state a *prima facie* case of malicious prosecution, Moldowan "must prove: 1. Prior proceedings terminated in favor of the present plaintiff; 2. Absence of probable cause for those proceedings; 3. Malice, defined as a purpose other than that of securing the proper adjudication of the claim; and 4. A special injury that flows directly from the prior proceedings." *Payton v. City of Detroit,* 211 Mich. App. 375, 536 N.W.2d 233, 242 (1995) (citing *Young v. Motor City Apartments Ltd.,* 133 Mich. App. 671, 350 N.W.2d 790, 792 (1984)). Because Moldowan's 2003 re-trial obviously terminated in his favor, the first element is satisfied.

As to the issue of probable cause, consideration of that element generally involves factual disputes that extend beyond the scope of our jurisdiction on interlocutory appeal. The Michigan Court of Appeals, however, has made clear that, as a matter of law, the "[f]ailure to include all exculpatory facts is not adequate to sustain a suit for malicious prosecution." *Payton,* 536 N.W.2d at 242. Nevertheless, because "'[a]ctions for malicious prosecution are regarded by law with jealousy,'" *Roblyer v. Hoyt,* 343 Mich. 431, 72 N.W.2d 126, 128 (1955) (quoting *Van Sant v. American Express Co.,* 158 F.2d 924, 931 (3d Cir. 1946)), Michigan courts have held that "'the only situation in which an action for malicious prosecution would properly lie is where a police officer knowingly swears to false facts in a complaint, without which there is no probable cause.'" *King v. Arbic,* 159 Mich. App. 452, 406 N.W.2d 852, 858 (1987) (quoting *Belt v.*

Ritter, 18 Mich. App. 495, 171 N.W.2d 581, 586 (1969)).

In asserting his malicious prosecution claim against Detective Ingles, Moldowan alleges only that Ingles "failed, as the complaining witness, to make a full and fair disclosure of the material facts and allowed the prosecution ... to continue without probable cause." (J.A. 313.) Although Moldowan makes a vague and conclusory allegation that the criminal complaint against him was "based on the ... false evidence provided by Defendant Ingles," he never identifies any such "false evidence." (J.A. 314.) Moldowan's only substantive allegation in support of this claim is that Detective Ingles "deliberately failed to convey [Burroughs' statements] to the Macomb County Prosecutor." (J.A. 313.) Consequently, even accepting all of Moldowan's allegations as true, we conclude that, under *Payton,* a claim for malicious prosecution does not lie under these circumstances.

4. Counts XXII and XXIII-Destruction of Evidence (Schultz)

In Counts XXII and XXIII, Moldowan asserts statutory and constitutional claims against Officer Schultz based on the destruction of evidence introduced at Moldowan's first trial. It is undisputed that this evidence was destroyed in contravention of the trial court's explicit order that all such evidence was to be preserved "from this date forward until further order of the Circuit Court, Michigan Court of Appeals, or Michigan Supreme Court." (J.A. 2613.)

In Count XXIII, Moldowan asserts a statutory claim under 18 U.S.C. § 1503. That provision, however, provides criminal penalties for obstruction of justice through corrupt conduct and threats of force; it does not provide a civil claim for monetary damages. Nor does violation of that provision give rise to a claim for damages under 42 U.S.C. § 1983 because it does not contain explicit "rights-creating language." *Johnson v. City of Detroit,* 446 F.3d 614, 621 (6th Cir. 2006) (holding that "statutory language that merely 'benefits' putative plaintiffs without specific rights-creating language is insufficient to confer a personal federal right enforceable under § 1983" (citing *Gonzaga Univ. v. Doe,* 536 U.S. 273, 282, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002))). Accordingly, Officer Schultz is entitled to summary judgment as to Count XXIII.

Moldowan's constitutional claim in Count XXII, on the other hand, is a more involved question. "To safeguard a defendant's due process right to present a complete defense, the Supreme Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" *Wright,* 260 F.3d at 570 (quoting *Trombetta,* 467 U.S. at 485, 104 S.Ct. 2528). In *Trombetta,* for instance, the Supreme Court recognized that the Constitution may impose a duty on the state "to preserve evidence" where such evidence "might be expected to play a significant role in the suspect's defense." 467 U.S. at 488, 104 S.Ct. 2528.

Defendants again argue that, even though *Trombetta* recognized that the failure to preserve evidence may give rise to a constitutional violation,

summary judgment nevertheless is warranted because Moldowan cannot demonstrate bad faith on the part of Officer Schultz. In defining the contours of this "area of constitutionally guaranteed access to evidence," however, the Supreme Court has developed separate tests "to determine whether the government's failure to preserve evidence rises to the level of a due process violation in cases where material exculpatory evidence is not accessible, versus cases where [merely] 'potentially useful' evidence is not accessible." *Wright,* 260 F.3d at 570 (citations omitted). As we explained above in regard to Moldowan's claims against Detective Ingles, *see supra* Part IV.C.1, the Supreme Court has recognized that the state violates a suspect's due process rights, regardless of the bad faith of the state actor, where material exculpatory evidence is not preserved. *See Trombetta,* 467 U.S. at 489, 104 S.Ct. 2528. Accordingly, the more burdensome bad faith requirement does not apply where material exculpatory evidence was lost or destroyed. *See Wright,* 260 F.3d at 571 ("The destruction of material exculpatory evidence violates due process regardless of whether the government acted in bad faith."); *see also Monzo v. Edwards,* 281 F.3d 568, 580 (6th Cir. 2002) (discussing bad faith requirement only in terms of potentially useful evidence).

In light of these distinct tests, Moldowan would need to demonstrate bad faith only if the evidence at issue is merely "potentially useful." At this stage, however, we cannot resolve that disputed issue of fact. *See Johnson,* 515 U.S. at 313-18, 115 S.Ct. 2151; *Gregory,* 444 F.3d at 744-45. Nevertheless, even assuming that the evidence at issue was materially

exculpatory, Moldowan still would be required to show that the "exculpatory value" of the evidence was "apparent" before it was destroyed. *Trombetta,* 467 U.S. at 489, 104 S.Ct. 2528.

Although the record indicates that the materiality of this evidence was, or at least should have been, apparent to Detective Ingles and other investigating officers, there is no evidence in the record that Officer Schultz had any knowledge whatsoever about the nature of the evidence that he destroyed. According to Officer Schultz's undisputed testimony, he was assigned the entirely ministerial task of sending out annual inquiries to the detectives in charge of each case, asking whether the detective wanted the evidence being held in the property room "held, destroyed or released." Schultz testified that he had no involvement in the Moldowan case, had no knowledge of what type of evidence was being held in the property room, and was not aware of the court order requiring that evidence from the first trial be preserved. Even read in the light most favorable to Moldowan, there simply is no evidence that Officer Schultz had any idea that the evidence he destroyed "could form a basis for exonerating the defendant." *Youngblood,* 488 U.S. at 58, 109 S.Ct. 333. We therefore reverse the district court's denial of summary judgment as to Count XXII.

5. Counts XXIV and XXVI-Municipal Liability (City of Warren)

Moldowan also asserts various claims against the City of Warren and the Warren Police Department. Because the district court dismissed the Department

as a defendant and Moldowan did not appeal that ruling, only the City's susceptibility to suit is before us. In Count XXIV, Moldowan claims that the City is liable under § 1983 for failing to adequately train its police officers regarding the constitutional rights of criminal defendants. In Count XXVI, Moldowan claims that the City is liable because an unidentified individual with "policy-making authority" ordered the destruction of evidence in contravention of the trial court's order.

Because qualified immunity is unavailable in § 1983 claims against a municipality, *see Pearson,* 129 S.Ct. at 822 (citing *County of Sacramento v. Lewis,* 523 U.S. 833, 841 n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)), the City instead argues that Moldowan cannot establish municipal liability on any of these claims because he cannot establish an underlying deprivation of a constitutional right. As explained above, however, we find that Moldowan's failure-to-disclose claims against Detective Ingles do implicate clearly established due process rights. Moreover, "[t]he courts recognize a systematic failure to train police officers adequately as custom or policy which can lead to city liability." *Gregory,* 444 F.3d at 753 (citing *City of Canton v. Harris,* 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)). This Court consistently has recognized that a plaintiff may establish municipal liability by showing "a policy of inadequate training or supervision," including "a policy of tolerating federal rights violations [that] is unwritten but nevertheless entrenched." *Thomas v. City of Chattanooga,* 398 F.3d 426, 429 (6th Cir. 2005) (citing *Doe v. Claiborne County,* 103 F.3d 495, 508 (6th Cir. 1996)). In light of this controlling

authority, we conclude that Moldowan's allegations, when taken as true, sufficiently establish that the City's alleged failure to adequately train its officers potentially violated his constitutional rights. As the Supreme Court consistently has recognized, "a city can be liable under § 1983 for inadequate training of its employees." *Harris,* 489 U.S. at 388, 109 S.Ct. 1197.

In discussing the "failure-to-train" theory of municipal liability, the Supreme Court explained in *Harris* that "the focus must be on [the] adequacy of the training program in relation to the tasks the particular officers must perform." *Id.* at 390, 109 S.Ct. 1197. Although *Harris* involved a city's failure to train its officers to determine whether a detainee required medical care, the Supreme Court spoke more broadly, noting that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* The Court noted that this theory of liability is an issue "on which the Courts of Appeals have all agreed," collecting cases in a broad array of areas. *Id.* at 388 & n.6, 109 S.Ct. 1197.

Because we already have determined that the police have a duty to preserve and turn over to the prosecutor evidence that the police recognize as having exculpatory value or where the exculpatory value of the evidence is apparent, *Harris* dictates that the City has a corresponding obligation to

adequately train its officers in that regard.[18] *See id.* at 390 (recognizing that a city may be liable for failing to provide adequate training "in light of the duties assigned to specific officers or employees"); *Brady*, 187 F.3d at 114 (noting that properly handling exculpatory evidence is a "standard police function").

As to Count XXVI, we also must determine whether Moldowan can establish municipal liability based on the decisions an unidentified "individual having final policy-making authority."[19] In *Monell v.*

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[18] The City also argues that the record does not support § 1983 liability in this case because, unlike *Gregory*, the City introduced evidence demonstrating that it has developed and implemented adequate training for its officers. Moldowan disputes the adequacy of this effort. Resolving such disputed factual issues is beyond the scope of this interlocutory appeal.

[19] Defendants vigorously argue that, even taking all of his allegations as true, Moldowan will not be able to prevail on Count XXVI. This argument does have some appeal. Despite extensive discovery, Moldowan has yet to identify the individual responsible for ordering the destruction of evidence. Moldowan also has not introduced any evidence of an official policy directing officers to withhold exculpatory evidence from the prosecutor. Nor has he alleged a "clear and persistent pattern" of such conduct. *See Doe*, 103 F.3d at 508. In fact, the City points to deposition testimony and sworn statements suggesting that no such pattern or custom exists. Nevertheless, whether Moldowan has alleged facts sufficient to satisfy the elements of a claim for municipal liability is beyond the scope of this interlocutory appeal. The evidence on which Defendants rely does not, as did the record evidence before the Supreme Court in *Scott*, "so utterly discredit[ ]" Moldowan's assertions such that "no reasonable jury could have believed him." 550 U.S. at 380, 127 S.Ct. 1769.

New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that local government units could be held liable under § 1983 for deprivations of federal rights, but concluded that § 1983 did not support *respondeat superior* liability, reasoning that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691, 98 S.Ct. 2018. In *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (plurality opinion), however, the Court clarified that this "official policy" requirement did not preclude municipal liability "for a single decision by municipal policymakers under appropriate circumstances." *Id.* at 480, 106 S.Ct. 1292.

Although *Pembaur* recognized policy-maker liability, the Court made clear that "not every decision by municipal officers automatically subjects the municipality to § 1983 liability." *Id.* at 482, 106 S.Ct. 1292. Rather, municipal liability "attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* In other words, the official must be "responsible for establishing final government policy respecting such activity before the municipality can be held liable." *Id.* at 483, 106 S.Ct. 1292.

Under *Pembaur,* therefore, the City may be held liable under § 1983 for the failure to disclose exculpatory evidence and the destruction of evidence from Moldowan's first trial, even though those actions were not taken pursuant to an overarching policy. And, contrary to Defendants' assertions,

municipal "policymaker" liability has been clearly established at least since *Pembaur* was decided in 1986.[20]

Because we conclude that Moldowan's claims against the City are based on claims that implicate clearly established constitutional rights, we affirm the district court's denial of summary judgment as to these claims.

6. Counts V-VIII, XVI-XIX, and XXXIV-Conspiracy Claims

Moldowan's Third Amended Complaint also asserts numerous claims alleging that the Defendants, in various ways, conspired together to violate his constitutional rights. Moldowan's conspiracy claims are asserted against Defendants Ingles, Fournier, and Dr. Warnick acting in concert together as well as with unnamed members of the Warren Police Department and the Macomb County Prosecutor's Office.

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[20] We also disagree with the notion that Moldowan cannot make out a claim against the City under Count XXVI because he cannot show any constitutional violation on the part of Officer Schultz. Although Officer Schultz did not violate Moldowan's constitutional rights by destroying the case evidence, Moldowan nevertheless may be able to show that "the individual with final policy-making authority who directed . . . the destruction of the evidence" was aware of the materiality of the evidence, and thus did violate Moldowan's rights under *Trombetta* and *Youngblood*. Thus, at this stage at least, we are not inclined to grant summary judgment on that basis.

In this circuit, "[i]t is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch,* 826 F.2d 1534, 1538 (6th Cir. 1987). After reviewing each of Moldowan's conspiracy claims, it is evident that he has failed to plead these claims with the requisite specificity. In Count V, for instance, Moldowan merely asserts that Dr. Warnick and Detective Ingles, along with other unnamed members of the Warren Police Department, "conspired together for the illegal purpose of violating [his] civil rights." (J.A. 287.) To support that claim, Moldowan offers only one substantive factual allegation, that "Defendants ... arrang[ed] for the photographing of the bite marks on Ms. Fournier and for making molds of Mr. Moldowan's and Mr. Cristini's dentition." (J.A. 287.) Moldowan makes no other allegations of acts taken in furtherance of a conspiracy. Without offering any further allegations, Moldowan then incorporates these "prior allegations" in Counts VI-VIII, serially recasting this claim as different constitutional violations. Moldowan takes the same approach in all of his other conspiracy claims, offering nothing more than one conclusory allegation in his first claim in the series, and then repeatedly recasting that allegation as different constitutional violations.

As in *Gutierrez,* a review of the allegations contained in Moldowan's various conspiracy claims evinces that "they are insufficient to withstand a motion for summary judgment [because they] ... lack the requisite material facts and specificity necessary to sustain a conspiracy claim." 826 F.2d at 1539; *see*

also Jaco v. Bloechle, 739 F.2d 239, 245 (6th Cir. 1984) (affirming dismissal of conspiracy claim where "complaint merely alleged broad conclusory negligence language void of the factual allegations necessary to support a conspiracy theory"). Accordingly, summary judgment is appropriate as to each of Moldowan's nine conspiracy claims. *See Spadafore v. Gardner,* 330 F.3d 849, 853-54 (6th Cir. 2003).

7. Count XXXV-False Imprisonment

In Count XXXV, Moldowan asserts a claim under the Michigan Constitution against the City of Warren for false imprisonment and continued seizure without probable cause. Specifically, Moldowan alleges that, after Dr. Hammel recanted her testimony and the Michigan Supreme Court reversed his conviction in 2002, there no longer was "probable cause to believe that [he] had committed the criminal acts that Defendant Fournier accused him of," and that, "[b]y virtue of being held under house arrest without probable cause," he was "unlawfully restrained." (J.A. 319-20.) Moldowan asserts that this restraint on his liberty violated the Michigan Constitution and constituted *ultra vires* conduct which was not within the scope of Defendants' governmental authority. On appeal, the City contends that it is entitled to immunity under M.C.L. § 691.1407(1), regardless of whether Moldowan alleges that Defendants acted intentionally.

Michigan law makes clear, however, that "[g]overnmental immunity is not available ... where it is alleged that the state has violated a right conferred

by the Michigan Constitution." *Burdette v. State of Mich.*, 166 Mich. App. 406, 421 N.W.2d 185, 186 (1988) (citing *Smith v. Dep't of Pub. Health*, 428 Mich. 540, 410 N.W.2d 749 (1987)). Although the governmental immunity recognized in § 691.1407 extends to "intentional torts" that are "committed within the scope of a governmental function," that immunity does not extend to Moldowan's claims in this case because "intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function." *Smith*, 410 N.W.2d at 780. As the Michigan Court of Appeals held in *Burdette:* a "defendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions." 421 N.W.2d at 186-87. This conclusion is not affected by the Michigan trial court's determination, prior to Moldowan's first trial, that probable cause existed. *Cf. Hinchman v. Moore*, 312 F.3d 198, 202-03 (6th Cir. 2002) (holding that "a finding of probable cause in a prior criminal proceeding does not bar a plaintiff in a subsequent civil action from maintaining a claim for malicious prosecution under Michigan law where the claim is based on a police officer's supplying false information to establish probable cause" (citing *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001))).

Nor are we persuaded by Defendants' arguments that we should resolve the disputed factual issues underlying the probable cause question. Whether

probable cause exists to arrest and detain a suspect generally is a question of law that we may review *de novo*. *See United States v. Combs*, 369 F.3d 925, 937 (6th Cir. 2004) (citing *United States v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999)). Because of the posture of this appeal, however, we lack jurisdiction to consider the disputed issues of fact that are critical to resolving Moldowan's claim that there was a want of probable cause. *See Johnson*, 515 U.S. at 313-18, 115 S.Ct. 2151; *Gregory*, 444 F.3d at 743-44. We therefore affirm the district court's denial of immunity as to Count XXXV.

V.

Next we turn to the claims raised by Dr. Warnick's appeal (Case No. 07-2116). Dr. Warnick is the forensic odontologist who testified that, in his expert opinion, the bite-mark evidence conclusively linked Moldowan to the attack. Dr. Warnick's testimony undoubtedly played a major role in Moldowan's conviction as it confirmed Fournier's testimony that Moldowan was one of her assailants. Moldowan asserts various claims against Dr. Warnick. Each of these claims is considered in turn.

A. Counts I-IV-Fabricating Evidence and Withholding Exculpatory Evidence

In Counts I-IV, Moldowan asserts violations of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments, alleging that Dr. Warnick, "either intentionally or with deliberate indifference and/or with reckless disregard of the truth and of [Moldowan's] constitutional rights, fabricated

evidence and withheld impeaching and exculpatory evidence from the Macomb County Prosecutor and from [Moldowan's] defense counsel." (J.A. 284.) In response, Dr. Warnick argues that he is entitled to summary judgment on these claims because Moldowan's complaint failed to identify the allegedly unconstitutional conduct. Dr. Warnick's argument is not well taken.

Qualified immunity shields government officials acting within the scope of their official duties from civil liability insofar as their conduct does not violate clearly established rights. *See Harlow,* 457 U.S. at 817-18, 102 S.Ct. 2727. In clarifying the scope of the qualified immunity inquiry, the Supreme Court stated in *Mitchell*:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, *nor even determine whether the plaintiff's allegations actually state a claim.* All it need determine is a question of law: whether the *legal norms* allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

472 U.S. at 528, 105 S.Ct. 2806 (emphasis added). Accordingly, we need not determine at this stage whether Moldowan's complaint states a claim on which relief may be granted, but only whether, assuming the facts as asserted by Moldowan, the "legal norms allegedly violated by the defendant were clearly established at the time of the challenged action." *Id.*

In *Gregory,* we reasoned that expert forensic examiners "act in an investigatory fashion when they interpret and document physical evidence," and thus we determined that "the intentional fabrication of a forensic report" is subject to the same considerations applied to the intentional fabrication of evidence by a police officer or prosecutor. 444 F.3d at 740. Under that framework, *Gregory* concluded that a forensic expert may be subject to suit under § 1983 for deliberately withholding the existence of exculpatory forensic evidence or fabricating forensic evidence. *Id.* at 744. Relying on *Spurlock, Gregory* reaffirmed that a forensic expert defendant "'cannot seriously contend that a reasonable [investigator] would not know that such actions were inappropriate and performed in violation of an individual's constitutional . . . rights.'" [21] *Id.* at 744 (quoting

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[21] Contrary to Dr. Warnick's suggestion, the fact that he subsequently testified as to these issues does not insulate him from liability. As we made clear in *Gregory,* absolute testimonial immunity does not "relate backwards" to protect a defendant for any activities he allegedly engaged in prior to taking the witness stand. 444 F.3d at 738-39 ("Subsequent testimony can not insulate previous fabrications of evidence merely because the testimony relies on that fabricated evidence.").

Spurlock, 167 F.3d at 1005) (alteration in *Gregory*). *Gregory*'s reliance on *Spurlock* is significant because we determined in that case that this legal norm was clearly established at least as early as April or May of 1990. 167 F.3d at 998-99, 1006.

Because Dr. Warnick challenges the factual allegations that he fabricated and manipulated evidence, however, we lack jurisdiction to consider Dr. Warnick's appeal from the denial of summary judgment as to Counts I-IV.

B. Count XXXIII-Gross Negligence

In Count XXXIII, Moldowan asserts a claim of gross negligence under state law. Under Michigan law, Dr. Warnick enjoys statutory immunity from liability to the extent that his conduct was within the scope of his duties as the State's forensic expert. M.C.L. § 691.1407(2). Because Dr. Warnick's conduct plainly falls within the scope of his duties, Moldowan must demonstrate that Dr. Warnick's conduct rises to the level of "gross negligence." *See Payton,* 536 N.W.2d at 242. Gross negligence is defined by statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." M.C.L. § 691.1407(7)(a); *see also Tallman v. Markstrom,* 180 Mich. App. 141, 446 N.W.2d 618 (1989). Moldowan argues that Dr. Warnick's conduct rises to the level of gross negligence and that Dr. Warnick *intentionally* withheld exculpatory evidence and fabricated evidence to support his conclusions. Under Michigan law, "the immunity provided by MCL 691.1407(2) does not apply to an intentional tort by an individual governmental employee." *Walsh*

v. Taylor, 263 Mich. App. 618, 689 N.W.2d 506, 510 (2004). Again, however, because Dr. Warnick does not concede the factual allegations underlying Moldowan's claim, we lack jurisdiction to consider this issue on interlocutory appeal.

VI.

Finally, we address whether Fournier is entitled to immunity as to the various claims Moldowan asserts against her (Case No, 07-2117).

A. Absolute Testimonial Immunity

As an initial matter, we note that, to the extent that Moldowan's claims against Fournier rely on allegations that she offered perjured testimony at trial, Fournier is entitled to absolute immunity. *Briscoe,* 460 U.S. at 345, 103 S.Ct. 1108. Fournier is entitled to immunity regardless of whether she conspired to deliver false or incomplete testimony. *See Alioto v. City of Shively,* 835 F.2d 1173, 1174 (6th Cir. 1987) ("The doctrine enunciated in *Briscoe v. LaHue* also shields from liability alleged conspiracies to give false and incomplete testimony in judicial proceedings.").

Moldowan argues that Fournier is not entitled to testimonial immunity under *Briscoe* because she was the "complaining witness." As noted above, the Supreme Court has excluded from the scope of protections offered by the doctrine of absolute immunity any conduct taken as the "complaining witnesses," such as where a police officer submits a false affidavit in support of an arrest warrant

application. *See Malley*, 475 U.S. at 340-41, 106 S.Ct. 1092. The record, however, plainly shows that Detective Ingles, *not Fournier*, functioned as the complaining witness in submitting the August 14, 1990 criminal complaint against Moldowan.[22] (J.A. 2238.) The criminal complaint identifies Fournier only as the "victim or complainant." (J.A. 2238.)

This is no mere formal distinction. Fournier did not submit an affidavit to secure the arrest warrant, nor did she take any other actions to initiate Moldowan's arrest or prosecution that courts previously have found critical in applying the complaining witness exception. Although Fournier's identification of Moldowan as one of her attackers certainly was critical to Detective Ingles' decision to file a criminal complaint against Moldowan and the Macomb County Prosecutor's decision to pursue Moldowan's prosecution, her statements were only part of a broader, independent investigation. As the record shows, the police also were led to Moldowan by statements from Fournier's sister, Moldowan's prior arrests, and other evidence. In fact, Detective Ingles testified that he did not speak to Fournier until two days after the assault, during which time his investigation proceeded without her assistance. By the time Detective Ingles interviewed Fournier, he already had identified Moldowan as a likely suspect.

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[22] In fact, Moldowan's Third Amended Complaint explicitly acknowledges that "Defendant Ingles signed [the] Complaint as the complaining witness charging Jeffrey Moldowan with four felonies." (J.A. 275.)

Given Fournier's limited role leading up to Moldowan's arrest, and in light of the independent inquiry conducted by the police, extending the complaining witness exception to Fournier in this case would run counter to the *functional* analysis we must apply in this context. *See Holloway v. Brush*, 220 F.3d 767, 774 (6th Cir. 2000) ("Absolute immunity is determined by a functional analysis that looks to 'the nature of the function performed, not the identity of the actor who performed it.'" (quoting *Buckley*, 509 U.S. at 269, 113 S.Ct. 2606)).

B. Count XVI-XIX- § 1983 Conspiracy Claims

In Counts XVI-XIX, Moldowan asserts claims under § 1983 against Fournier, a private citizen, alleging that she conspired to violate his Fourth, Fifth, Sixth, and Fourteenth Amendment rights by fabricating evidence or withholding exculpatory evidence. In addition to being inadequately pled, *see supra* Part IV.C.6, we also hold that Moldowan cannot maintain an action under § 1983 against Fournier because she is not a "state actor" and did not act "under color of law." *See Tahfs v. Proctor*, 316 F.3d 584, 590 (6th Cir. 2003) ("A plaintiff may not proceed under § 1983 against a private party 'no matter how discriminatory or wrongful' the party's conduct." (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999))).

This circuit recognizes three tests for determining whether private conduct is fairly attributable to the state: the public function test, the state compulsion test, and the nexus test.

> The public function test "requires that the private entity exercise powers which are traditionally exclusively reserved to the state...." The typical examples are running elections or eminent domain. The state compulsion test requires proof that the state significantly encouraged or somehow coerced the private party, either overtly or covertly, to take a particular action so that the choice is really that of the state. Finally, the nexus test requires a sufficiently close relationship (*i.e.* through state regulation or contract) between the state and the private actor so that the action may be attributed to the state.

Ellison v. Garbarino, 48 F.3d 192, 195 (6th Cir. 1995) (citations omitted). Moldowan offers no basis for concluding that any of these tests applies here. Providing information to the police, responding to questions about a crime, and offering witness testimony at a criminal trial does not expose a private individual to liability for actions taken "under color of law." *See Briscoe,* 460 U.S. at 329, 103 S.Ct. 1108 ("[Section] 1983 does not allow recovery of damages against a private party for testimony in a judicial proceeding."); *see also Benavidez v. Gunnell,* 722 F.2d 615, 618 (10th Cir. 1983) ("We know of no case in which the report of a state crime is action under color of state law under § 1983. The mere furnishing of information to police officers does not constitute joint action under color of state law which renders a private citizen liable under §§ 1983 or 1985.").

Fournier thus is entitled to summary judgment as to Counts XVI, XVII, XVIII, and XIX.

C. Count XXX-Malicious Prosecution

Moldowan also cannot sustain a claim for malicious prosecution against Fournier. Under Michigan law, a plaintiff may maintain a claim of malicious prosecution "against a private person" where the plaintiff offers "proof that the private person instituted or maintained the prosecution and that the prosecutor acted on the basis of information submitted by the private person that did not constitute probable cause." *Matthews v. Blue Cross & Blue Shield*, 456 Mich. 365, 572 N.W.2d 603, 610 (1998). Michigan law, however, also recognizes that a criminal prosecution "is initiated in the sole discretion of the prosecutor." *Id.* at 605. This is critical because, as the Michigan Supreme Court explained in *Matthews*, the intervening and "independent exercise of prosecutorial discretion establishes that the private defendant did not initiate the prosecution." *Id.* at 613. Thus, if the police or the prosecutor initiate the prosecution on the basis of evidence obtained through their own *independent investigation*, the complaining victim is insulated from liability. *Id.* at 613 n. 28 (""The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings."" (quoting 3 Restatement Torts 2d § 653, cmt. g)). "Thus, in Michigan, the prosecutor's exercise of his independent discretion in initiating and maintaining

a prosecution is a *complete defense* to an action for malicious prosecution." *Id.* at 613 (emphasis added).

That is precisely the case here. As noted above, although Fournier's identification of Moldowan as one of her attackers certainly was critical to the Macomb County Prosecutor's decision to prosecute him, her statements were only part of a broader, independent investigation. Under controlling Michigan authority, the exercise of independent judgment and discretion on the part of the police and the prosecutor precludes, as a matter of law, a malicious prosecution claim against Fournier.

D. Count XXXVI-Intentional Infliction of Emotional Distress

In Count XXXVI, Moldowan also asserts a state law intentional infliction of emotional distress claim against Fournier. According to the Third Amended Complaint, that claim rests on Fournier's alleged conduct "outside the courtroom with respect to the second prosecution." (J.A. 321.) But Fournier's role in the second prosecution was limited to testifying. There is nothing in the record to suggest that Fournier did anything "outside the courtroom" leading up to the second trial that would support Moldowan's claim. Accordingly, Fournier is entitled to absolute immunity as to Count XXXVI. *See Briscoe,* 460 U.S. at 342-45, 103 S.Ct. 1108.

VII.

For all of the reasons set forth above, we hereby: (1) hold that we lack jurisdiction to consider Defendants' interlocutory appeals from the denial of summary judgment as to Counts I, II, III, IV, and XXXIII and thus **DISMISS** Defendants' appeals as to those claims, but **DENY** Moldowan's motions to dismiss with respect to all other Counts; (2) **REVERSE** the judgment of the district court and grant summary judgment as to Counts V, VI, VII, VIII, XVI, XVII, XVIII, XIX, and XXXIV on the ground that Moldowan failed to plead his conspiracy claims with the requisite specificity; (3) **REVERSE** the judgment of the district court and grant summary judgment as to Counts XIII, XIV, XV, XXII, and XXXVI on the ground that Defendants are entitled to immunity as to these claims; (4) **REVERSE** the judgment of the district court and grant summary judgment as to Counts XVI, XVII, XVIII, and XIX on the ground that § 1983 cannot support a claim against Fournier, a private individual, under these circumstances; (5) **REVERSE** the judgment of the district court and grant summary judgment as to Count XXIII on the ground that 18 U.S.C. § 1503 does not provide a private right of action and cannot support a civil claim for damages under § 1983; (6) **REVERSE** the judgment of the district court and grant summary judgment as to Count XXX on the ground that Michigan law does not support a claim for malicious prosecution against a victim complainant under these circumstances; (7) **REVERSE** the judgment of the district court and grant summary judgment as to Count XXXI on the ground that Michigan law does not support a claim

for malicious prosecution against Detective Ingles under these circumstances; and (8) **AFFIRM** the judgment of the district court denying summary judgment as to Counts IX, X, XI, XII, XXIV, XXVI, and XXXV on the grounds that Moldowan's allegations implicate clearly established constitutional rights and that Defendants are not entitled to immunity as to these claims.

KETHLEDGE, Circuit Judge, concurring in the judgment in part, and dissenting in part.

Moldowan puts many labels on his claims, but his claim against Officer Ingles is essentially that he should have disclosed, presumably to the prosecutor, the fact and contents of Jerry Burroughs' alleged statement to Ingles. I agree with the majority's conclusion that, under the standard of review applicable here, Moldowan is entitled to proceed with that claim. But I respectfully disagree with how the majority gets there.

I.

A.

With a significant caveat, the majority gets there by extending the no-fault regime of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)-or at least something functionally "analogous" to it, Maj. Op. at 379-to police officers. The caveat, as discussed below, may as a practical matter render insignificant the differences between the majority's approach and my own. I think it important, however,

to explain why extending the *Brady* regime to police officers would be both unprecedented and unwise.

"The *Brady* doctrine imposes an absolute duty on the prosecutor to produce all materially favorable evidence in the State's possession." *Villasana v. Wilhoit,* 368 F.3d 976, 979 (8th Cir. 2004). By its terms, therefore, *Brady* applies to prosecutors, not police officers. *Brady* itself, of course, did not involve police conduct at all, but rather concerned a criminal defendant's attempt to obtain a new trial based upon the prosecution's suppression of evidence favorable to him. In granting Brady partial relief from his conviction, the Court held "that the suppression *by the prosecution* of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith *of the prosecution.*" 373 U.S. at 87, 83 S.Ct. 1194 (emphasis added). Thus the *Brady* duty, as stated by the *Brady* Court, was imposed on the prosecutor; and in cases since, "[t]he Supreme Court has never imposed this absolute duty on law enforcement officials other than the prosecutor." *Villasana,* 368 F.3d at 979; *see also Jean v. Collins,* 221 F.3d 656, 660 (4th Cir. 2000) (*en banc*) (Wilkinson, C.J., concurring in the judgment) ("The Supreme Court has always defined the *Brady* duty as one that rests with the prosecution") (collecting Supreme Court cases); *Lindsay v. Bogle,* 92 F. App'x 165, 170 (6th Cir. 2004) ("the *Brady* obligation applies only to prosecutors").

The imposition of that same absolute duty on police officers, therefore, would represent an extension of *Brady* that the Supreme Court itself has

not made in the 46 years since it rendered the decision. I do not think the omission is fortuitous. Not only by its terms, but also by its content, the *Brady* duty is uniquely tailored to prosecutors. It applies to exculpatory evidence that is "material"; and the Supreme Court says that "[s]uch evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, *the result of the proceeding* [that is, the criminal trial] *would have been different.*'" *Strickler v. Greene,* 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). Whether a particular piece of evidence would have changed the result of a criminal trial, of course, is a judgment that prosecutors, not police officers, are trained to make. The Eighth Circuit so observed in refusing to extend *Brady* to police officers:

> It is logical to impose *Brady's* absolute duty on the government official who will present the State's case at trial [*i.e.,* the prosecutor], who can be expected to gather material evidence from law enforcement agencies, and who is in the best position to evaluate whether evidence must be disclosed because it is materially favorable to the defense.

Villasana, 368 F.3d at 979. And so too, in rejecting the same extension, did a plurality of the en banc Fourth Circuit:

> The *Brady* duty is framed by the dictates of the adversary system and the prosecution's legal role therein. Legal terms of art define

> its bounds and limits. The prosecutor must ask such lawyer's questions as whether an item of evidence has "exculpatory" or "impeachment" value and whether such evidence is "material." It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution's task of evaluating it.

Jean, 221 F.3d at 660 (Wilkinson, C.J., concurring in the judgment).

The extension is also unnecessary. The *Brady* rule *already* "encompasses evidence 'known only to police investigators and not to the prosecutor.'" *Strickler*, 527 U.S. at 280-81, 119 S.Ct. 1936 (quoting *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). But it is the prosecutor, not the police themselves, who bears an absolute duty to disclose it. Indeed, even as to evidence solely in police possession-which is the kind of evidence at issue here-the Supreme Court has specifically refused to impose the *Brady* duty directly upon the police, saying that to do so "would ... amount to a serious change of course from the *Brady* line of cases." *Kyles*, 514 U.S. at 438, 115 S.Ct. 1555. Instead, to comply with *Brady*, " *the individual prosecutor* has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437, 115 S.Ct. 1555 (emphasis added). And any breach of that duty, no matter how diligent the prosecutor's efforts, entitles the criminal defendant to a new trial; "the prosecution's responsibility for failing to disclose

known [even only to the police], favorable evidence rising to a material level of importance is inescapable." *Id.* at 438, 115 S.Ct. 1555. Moreover, as discussed below, no one disputes that police officers already have an independent duty-though not a *Brady* duty-not to conceal materially exculpatory evidence in bad faith. Thus, as a practical matter, extending *Brady* to police officers would accomplish little with respect to the fairness of criminal trials that current law does not already accomplish.

What that extension would accomplish, rather, is a significant increase in lawsuits against police officers. Prosecutors enjoy absolute immunity for actions taken in their official capacities, *see Imbler v. Pachtman,* 424 U.S. 409, 413-16, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), whereas police officers do not. Police officers, therefore, would become the special object of attention from criminal defendants who believe that allegedly exculpatory evidence should have been, but was not, disclosed to their counsel prior to trial. And in this respect the police would present a large target. Police officers, particularly ones like Ingles who investigate violent crime in the field, obtain a great deal of information in the course of an investigation. Some of what they obtain, like shell casings, is tangible, but much of it, like things they may have seen or heard in the course of their activities, is not. As a practical matter, an officer cannot preserve, and thus pass on to the prosecutor, *everything* he sees, hears, or learns in the course of investigating a crime. He instead has to exercise judgment about what seems important and what does not. But if an officer bears an absolute duty to disclose materially exculpatory evidence, *all* of the

information thus filtered by an officer's judgment, even in the purest good faith, potentially becomes the basis of a lawsuit against him. An officer's failure to recognize an exculpatory clue, for example, and thus to pass it on to the prosecutor, would be a violation of the Due Process Clause. That the officer was merely negligent, or even that no reasonable officer could have understood the clue's significance at the time, would be no defense; the *Brady* duty is absolute. So if the clue could have changed the result of the criminal defendant's first trial, the defendant would not only get a second one; he would be entitled to have the officer pay him for his troubles as well.

This exposure would arise not only from evidence considered in isolation. We must consider evidence *cumulatively* in determining whether it is materially exculpatory for purposes of *Brady, see Kyles,* 514 U.S. at 436, 115 S.Ct. 1555, so an officer's failure to connect the exculpatory dots, as well, would render him liable for damages. Two, or indeed any number of, pieces of information, that might have seemed unimportant to a reasonable investigator at the time, but that present an exculpatory picture after the fact when arranged just so, would be grounds for a suit.

Once unleashed, these suits would be very difficult to stop short of trial. For in these cases the refuge of qualified immunity would be illusory. Qualified immunity requires that the officer violate "clearly established" constitutional rights to be liable, with the idea being that, by definition, such liability is usually limited to officers who knew or should have known they were violating the law. *See Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d

272 (2001). But it does an officer little good to be aware of the *existence* of a generic duty, if, when acting in good faith and to the best of his ability, he is not aware that he is breaching it. And because the *Brady* duty is absolute, a criminal-defendant-turned-plaintiff would need not prove that the officer knew-or even that any reasonable officer would have known-that the officer had a duty to disclose the particular information at issue. Foreknowledge of illegality would be beside the point; and thus, as a practical matter, qualified immunity would be no immunity at all.

B.

For good reason, then, no federal appellate court has extended *Brady*'s no-fault regime to police officers. Two circuits have addressed the issue directly; and both of them pointedly refused to make the extension. In *Porter v. White*, 483 F.3d 1294 (11th Cir. 2007), the court "h[e]ld that the no-fault standard of care *Brady* imposes on prosecutors in the criminal or habeas context has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process." *Id.* at 1306. The court thus concluded that "a negligent act or omission cannot provide a basis for liability in a § 1983 action seeking compensation for loss of liberty occasioned by a *Brady* violation." *Id.* at 1308. And in *Villasana*, the Eighth Circuit held that a "bad faith standard should likewise apply to due process claims that law enforcement officers preserved evidence favorable to the defense but failed to disclose it." 368 F.3d at 980.

None of the cases that the majority cites actually imposes *Brady*'s absolute duty of disclosure upon police officers. Most of them instead find liability for precisely the sort of bad-faith conduct that would give rise to liability under virtually any standard. *See, e.g., Jones v. City of Chicago,* 856 F.2d 985, 995 (7th Cir. 1988) (finding liability for "retaining records in clandestine files deliberately concealed from prosecutors and defense counsel"); *Hart v. O'Brien,* 127 F.3d 424, 446 (5th Cir. 1997) (permitting a § 1983 claim "against a police officer who, after learning of patently exculpatory evidence, deliberately fails to disclose it to the prosecutor") (internal quotation marks omitted).

Nor do our own decisions in *Spurlock v. Satterfield,* 167 F.3d 995 (6th Cir. 1999), and *Gregory v. City of Louisville,* 444 F.3d 725 (6th Cir. 2006), provide support for imposing such an absolute duty upon police officers. *Spurlock* was not a failure-to-disclose case at all, but instead involved claims of fabricated evidence. *See* 167 F.3d at 1005. And we decided *Gregory* emphatically on *jurisdictional* grounds. *See* 444 F.3d at 743-44 (holding that, because the defendant officer's " *sole argument* with the district court's denial of qualified immunity goes to whether there exists a genuine issue of fact for trial ... this Court lacks jurisdiction to entertain [the officer's] appeal from the district court's denial of qualified immunity for Plaintiff's claim of *Brady* violations") (emphasis added).

Still more revealing is Moldowan's heavy reliance-and to a lesser extent the majority's-on our decision in *Hilliard v. Williams,* 516 F.2d 1344 (6th

Cir. 1975), *vacated in part,* 424 U.S. 961, 96 S.Ct. 1453, 47 L.Ed.2d 729 (1976). The failure-to-disclose claim there was asserted against the defendant *prosecutor,* Williams, not the defendant police officer, Clark. *See id.* at 1349 ("Williams withheld an F.B.I. report indicating that there was no blood on [plaintiff's] jacket"). The Supreme Court vacated our decision as to that claim on direct review. The other claim in the case, against Officer Clark, was based upon his "deceptive and misleading *testimony* " at Hilliard's criminal trial. *Id.* (emphasis added). Which is to say, *Hilliard* was not a police-disclosure case at all. Moreover, as to Clark, we thought "it plain that a law enforcement officer who knowingly gives evasive, misleading, and deceptive testimony during a criminal trial cannot escape civil liability [.]" *Id.* That holding too has since been invalidated by the Supreme Court. *See Briscoe v. LaHue,* 460 U.S. 325, 328, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) ("all witnesses-police officers as well as lay witness-are absolutely immune from civil liability based on their trial testimony in judicial proceedings"). *Hilliard* is thus an empty husk of a decision, which did not present the issue before us in the first place, and which cannot possibly support extending *Brady* to police officers.

C.

1.

The issue before us today, as the majority correctly observes, is one of law rather than policy. And I would decide it as such. The standard that I would apply-and the one the Eighth and Eleventh

Circuits apply-is the one that the Supreme Court has so far *always* applied to determine officer liability in the "area of constitutionally guaranteed access to evidence": namely, bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 55, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)). This standard requires proof that the officer engaged in "a conscious effort to suppress exculpatory evidence." *California v. Trombetta*, 467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). That requirement "both limits the extent of the police's obligation ... to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Youngblood*, 488 U.S. at 58, 109 S.Ct. 333.

Notwithstanding this plain language, the majority reads *Youngblood* to mean that no showing of bad faith is required to establish a violation of due process *by the police* "where 'material exculpatory evidence' is concerned [.]" Maj. Op. at 385. But *Youngblood* does not quite say that. What *Youngblood* says is that "[t]he Due Process Clause of the Fourteenth Amendment, *as interpreted in Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence." 488 U.S. at 57, 109 S.Ct. 333 (emphasis added). That statement does not impose an absolute duty upon police officers-as shown above, there *was* no police conduct at issue in *Brady*-but is instead merely a restatement of the

prosecutor's absolute duty to disclose materially exculpatory evidence to the defendant. The evidence at issue in *Youngblood* was only "potentially" exculpatory, however, *id.* at 58, 109 S.Ct. 333, so it fell outside the scope of the prosecutor's absolute duty under *Brady*. The Court therefore considered whether the *police* had violated a duty "over and above" that imposed on the prosecutor, *id.* at 56, 109 S.Ct. 333, by failing to preserve that evidence. And the Court held that, to establish such a violation, Youngblood had to prove that the police destroyed the evidence in "bad faith[.]" *Id.* at 58, 109 S.Ct. 333.

But that holding does not mean that the police violate a defendant's due-process rights when, in the *absence* of bad faith, they fail to preserve or disclose materially exculpatory evidence. To the contrary, as the *Youngblood* Court's reiteration of the *Brady* duty makes clear, the failure to provide such evidence to the defendant would merely amount to a violation of the *prosecutor's* absolute duty to disclose such evidence. *See also Kyles,* 514 U.S. at 437, 115 S.Ct. 1555 ("*the individual prosecutor* has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police") (emphasis added). Nor does the Supreme Court's holding in Trombetta impose on police officers an absolute duty to preserve or disclose materially exculpatory evidence. Instead, the Supreme Court "rejected [Trombetta's] argument for several reasons[,]" the "first" of which was that "'the officers here were *acting in good faith and in accord with their normal practice*[.]'" *Youngblood,* 488 U.S. at 56, 109 S.Ct. 333 (quoting *Trombetta,* 467 U.S. at 488, 104 S.Ct. 2528) (emphasis added; internal quotation

marks omitted). That the Youngblood Court discussed the bad-faith standard in connection with potentially exculpatory evidence merely reflects the fact that, had the evidence there been materially exculpatory, there would have been no need to discuss police duties in the first place. Because in that event the prosecutor would have violated his duty under *Brady*.

2.

There remains the question whether Moldowan's claim against Ingles can proceed under *Youngblood*'s bad-faith standard. That claim is based upon Ingles' failure to convey to the prosecutor the substance of Burroughs' statement to Ingles. Two aspects of Burroughs' testimony, in my view, are critical. First, he testified that he had personally heard two men-neither of whom was Moldowan-discussing Fournier's rape while standing outside the house next to his house. That testimony, when viewed (as it must be) in the light most favorable to Moldowan, could be interpreted as meaning that the two men essentially admitted their involvement in the crime. Second, Burroughs testified that he told "my story" to Ingles. That reference, when viewed in that same light, could be understood to encompass *all* of Burroughs' story regarding the crime, including the two mens' admission on the sidewalk next door. Thus, when viewed in the light most favorable to Moldowan, and as a whole, Burroughs' testimony could be read to mean that he told Ingles that two other men had essentially admitted to committing the crime Ingles was investigating.

There is no direct evidence that Ingles withheld Burroughs' statement in bad faith. And I think courts should be wary of inferring bad faith from the mere fact of an officer's failure to disclose evidence, lest the bad-faith standard become in practice an absolute one. But I think that, under the circumstances present here, a jury could infer bad faith from Ingles' failure to disclose Burroughs' statement-whose existence, to be fair, Ingles disputes-to the prosecutor. Of course, a jury would be free *not* to make that inference, in part because they might choose to understand Burroughs' testimony in a light less favorable to Moldowan, or not to believe it at all. Given our standard of review, however, we are not so free. I therefore agree that Moldowan is entitled to proceed with his claim against Ingles.

3.

As that bottom-line agreement suggests, my disagreement with the majority may prove larger in theory than in practice. To establish an officer's conscious suppression of materially exculpatory evidence-and thus his bad faith-a plaintiff must prove, among other things, "the police's knowledge of the exculpatory value of the evidence at the time" the criminal defendant says it should have been disclosed. *Youngblood,* 488 U.S. at 56 n. *, 109 S.Ct. 333. And therein lies the common ground between my approach and that of the majority. Notwithstanding its rather extended defense of imposing an absolute duty of disclosure upon police officers, and its rejection of a bad-faith standard in this context, and its declaration that "'*Brady* creates a singular constitutional duty, which prosecutors and

police officers are capable of breaching in factually different ways[,]'" Maj. Op. at 380 (quoting *Jean*, 221 F.3d at 656 (Murnaghan, J., dissenting)), the majority, to its credit, does not simply extend *Brady*'s absolute duty of disclosure to police officers. The majority instead recognizes a "practical concern that the police cannot be held accountable for failing to divine the materiality of every possible scrap of evidence." Maj. Op. at 388. And the majority thus holds that a police officer does not breach his duty of disclosure unless the "'exculpatory value'" of the undisclosed evidence is "'apparent'" to him. Maj. Op. at 389 (quoting *Trombetta*, 467 U.S. at 489, 104 S.Ct. 2528). When applying that rule to Moldowan's claim against Officer Schultz, the majority holds-and I agree-that Schultz was entitled to summary judgment because "there is no evidence in the record" that he "had any knowledge whatsoever about the nature of the evidence that he destroyed." Maj. Op. at 392.

Thus, in the end, the majority extends *Brady*'s duty of absolute disclosure to police officers, but limits the scope of that duty to evidence whose materially exculpatory value was known to the particular officer sued. I think the better approach would be simply to apply the Supreme Court's bad-faith rule, rather than a modified version of an absolute rule designed for prosecutors. In practice, however, the latter rule will probably operate as the functional equivalent of the former.

D.

With one exception, I otherwise concur in the majority's disposition of the remaining claims in the

case. The exception concerns Count 26, in which Moldowan claims under § 1983 that the City is liable for Schultz's destruction of evidence. "A municipality ... cannot be liable under § 1983 absent an underlying constitutional violation by its officers." *Blackmore v. Kalamazoo County*, 390 F.3d 890, 900 (6th Cir. 2004). As discussed above, Schultz did not violate Moldowan's constitutional rights when he disposed of the evidence from Moldowan's first trial. The City therefore cannot be liable under § 1983 on this claim.

For these reasons, I concur partially in the judgment, and respectfully dissent in part.

578 F.3d 351

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEFFREY MICHAEL MOLDOWAN,

Plaintiff,

vs.

THE CITY OF WARREN, THE COUNTY OF MACOMB
AND ITS PROSECUTOR, in his official capacity, ALAN WARNICK, in his individual and official capacity, DONALD INGLES, in his individual and official capacity, MICHAEL SCHULTZ, in his individual and official capacity, and MAUREEN FOURNIER, individually,

Defendants.

Case No.: 05-70331

Hon. Anna Diggs Taylor
Magistrate Judge Virginia M. Morgan

FILED 08/14/2007

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ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS X AND XII AGAINST DEFENDANT INGLES [D/E #260]

At a session of said Court held in the United States Courthouse in the City of Detroit, County of Wayne, State of Michigan on this 2nd day of August, 2007

PRESENT: HONORABLE ANNA DIGGS TAYLOR
U.S. DISTRICT COURT JUDGE

This matter having come before the Court on Plaintiff's Motion For Partial Summary Judgment As To Counts X And XII Against Defendant Ingles, Defendant Ingles having filed a Response and Brief opposing said motion, Plaintiff having filed a Reply Brief in support of the motion, and the Court having heard oral argument and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that Plaintiff's motion is DENIED in its entirety for the reasons stated on the record.

SO ORDERED.

DATED: August 14, 2007

s/Anna Diggs Taylor
ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail disclosed on the Notice of Electronic Filing on August 14, 2007.

s/Johnetta M. Curry-Williams
Case Manager

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEFFREY MICHAEL MOLDOWAN

Plaintiff,

v.

THE CITY OF WARREN, THE POLICE DEPARTMENT OF THE CITY OF WARREN, THE COUNTY OF MACOMB, ERIC SMITH, MACOMB COUNTY PROSECUTOR, in his official capacity, ALAN WARNICK, in his individual and official capacity, DONALD INGLES, in his individual and official capacity, MICHAEL SCHULTZ, in his individual and official capacity, OTHER PRESENT AND FORMER MEMBERS OF THE WARREN POLICE DEPARTMENT AND OFFICE OF THE MACOMB COUNTY PROSECUTOR AS YET UNIDENTIFIED, in their individual and official capacities, and MAUREEN FOURNIER, individually,

Defendants.

Case No. 05-70331
Hon. Anna Diggs Taylor
Magistrate Judge Virginia M. Morgan

FILED 08/14/2007

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ORDER GRANTING IN PART AND DENYING IN PART WARREN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [D/E #258]

ORDER GRANTING IN PART AND DENYING IN PART WARREN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

At a session of said Court held in the United States Courthouse in the City of Detroit, County of Wayne, State of Michigan on this 2nd day of August, 2007

PRESENT: HONORABLE ANNA DIGGS TAYLOR
U.S. DISTRICT COURT JUDGE

This matter having come before the Court on Defendants' City of Warren, Warren Police Department, Donald Ingles and Michael Schultz' Motion for Summary Judgment and Plaintiff having filed a response and brief opposing said motion, and Defendants having filed a reply brief, and the Court having heard oral argument and being otherwise fully advised;

IT IS HEREBY ORDERED that all claims against the City of Warren Police Department are dismissed for the reason that the City of Warren Police Department is not a legal entity capable of being sued.

IT IS FURTHER ORDERED that the remainder of Defendants' Motion for Summary Judgment is denied for the reasons stated on the record.

IT IS SO ORDERED.
DATED: August 14, 2007

s/Anna Diggs Taylor
ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail disclosed on the Notice of Electronic Filing on August 14, 2007.

s/Johnetta M. Curry-Williams
Case Manager

(4)

No. 09-1149

Supreme Court, U.S.
FILED
MAY 20 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF WARREN, MICHIGAN, et al.,

Petitioners,

vs.

JEFFREY MICHAEL MOLDOWAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: May 20, 2010

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QUESTIONS PRESENTED

I. Should this Court deny the petition for writ of certiorari where the Sixth Circuit held, consistent with the Supreme Court's prior decisions, that an individual's rights to due process are violated where the police fail to produce evidence the exculpatory value of which is apparent without showing that the police acted in bad faith?

II. May a circuit court decline to exercise pendant, appellate jurisdiction over a municipal defendant's interlocutory appeal where its claims are not inextricably intertwined with the individual defendants' interlocutory claims?

PARTIES TO THE PROCEEDING

Petitioners are Defendants-Appellants City of Warren, Michigan, and Donald Ingles. Jeffrey Moldowan is the plaintiff-appellee in this action. Defendants-Appellants below, Michael Schultz, Alan Warnick, and Maureen Fournier, are not parties to this petition.

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JURISDICTION

In an Order dated October 23, 2009, the Sixth Circuit denied Petitioners' petition for rehearing and rehearing en banc. After this Court extended their time to file a petition, Petitioners filed their writ of certiorari on March 19, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Sixth Circuit's decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

Title 42 of the United States Code § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

> an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

This case involves *Brady* claims brought against Petitioners City of Warren and Donald Ingles, one of Warren's now-retired Detectives. In 1991, Respondent Jeffrey Moldowan was convicted of sexually assaulting his former girlfriend Maureen Fournier. Following his conviction, the trial court ordered the preservation of all evidence in the case.

After spending nearly twelve years in prison, the Michigan Supreme Court in 2002 reversed Mr. Moldowan's conviction after it was discovered that one of the prosecution's expert witness odontologist, Dr. Alan Warnick, had fabricated evidence that was key to the government's case. *People v. Moldowan*, 466 Mich. 862, 643 N.W.2d 570 (2002). Sometime during the years following his conviction, Petitioner City of Warren destroyed certain evidence subject to the trial court's preservation order.

After the Michigan Supreme Court overturned his conviction, but before his retrial, Mr. Moldowan also discovered a witness by the name of Jerry Burroughs who saw four African-American men (Respondent Moldowan is Caucasian) standing around a naked female lying in the street (presumably Fournier) on the morning that Fournier was found. Burroughs also said that he later heard two of those

same men talking about the incident and bragging about their participation in the assault. Pet. App. 10a.

During Respondent's retrial, Burroughs was questioned by the prosecutor who asked why Burroughs never came forward with his information concerning the crime. In response, Burroughs told the prosecutor that, several days after the crime (before the preliminary exam), he talked to a white male, plain-clothes officer from Warren who identified himself as a detective. According to Burroughs, he told the detective about the four African-American men and how two of them were later bragging about the crime. Burroughs further testified that the officer with whom he spoke "wasn't really interested" in hearing what he had to say.

Although Ingles admitted that he was the only Detective investigating the crime in Burroughs' neighborhood, he denied ever speaking to Burroughs about the incident. At no time during Mr. Moldowan's first trial did the prosecution ever disclose any notes relating to Burrough's statements exculpating Moldowan. At the conclusion of the retrial, Respondent was found not-guilty and finally released after nearly 12 years in prison.

On January 28, 2005, Respondent filed the instant action under § 1983 asserting the violation of his constitutional rights by, inter alia, Petitioners Ingles and the City of Warren. The crux of Respondent's claims are that Petitioner Ingles violated his

constitutional right to due process by failing to disclose evidence the exculpatory value of which was apparent. Respondent further claims that Petitioner City of Warren is liable for, among other things, failing to train its officers as to their duty to disclose *Brady* evidence and for destroying and/or failing to preserve evidence.

Following extensive discovery, Petitioners moved for summary judgment. Petitioner Ingles claimed that, even assuming he failed to disclose the exculpatory evidence at issue, he cannot be held liable under § 1983 without showing that he acted in bad faith, and that alternatively he is entitled to qualified immunity because the law was not so clearly established at the time of his actions. The district court denied Petitioners' motions for summary judgment finding numerous questions of fact surrounding the nondisclosure of the *Brady* evidence. Both Petitioners Ingles and the City of Warren appealed the district court's rulings to the Sixth Circuit.

On appeal, the Sixth Circuit affirmed the denial of Petitioner Ingles' qualified immunity defense. Relying on this Court's prior decisions, including *California v. Trombetta*, 467 U.S. 479 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988), the majority held that the law was clearly established that a police officer violates an individual's due process rights by failing to disclose evidence the exculpatory value of which is apparent even without a showing of bad faith on the part of the officer. Pet. App. 52a-64a. Both the majority and the concurrence concluded,

however, that even if bad faith were a requirement, there were sufficient factual disputes surrounding whether Petitioner Ingles acted in bad faith and thus, in any event, Petitioner Ingles was not entitled to qualified immunity. Pet. App. 65a, 92a.

As to the municipal defendant, the majority panel concluded that it lacked pendant, appellate jurisdiction over Petitioner City of Warren's interlocutory appeal because it was not inextricably intertwined with Petitioner Ingles' qualified immunity defense. Pet. App. 74a-77a.

REASONS FOR DENYING THE PETITION

I. Consistent with this Court's decisions, the Sixth Circuit correctly held that where the police fail to disclose material evidence the exculpatory value of which is apparent, a defendant turned plaintiff need not demonstrate bad faith to support a due process *Brady* claim brought under 42 U.S.C. § 1983.

This case deals with the area of law concerning the accessibility of evidence in criminal proceedings. Petitioners contend that the circuit court's opinion conflicts with Supreme Court precedent where the Sixth Circuit ruled that, in the context of a claim brought under § 1983, Respondent Moldowan need not prove bad faith against a police officer who withheld evidence the exculpatory value of which was

apparent. A cursory reading of this Court's prior case law makes clear that the Sixth Circuit's decision is entirely consistent with the law as handed down by this Court, and that contrary to Petitioners' assertion, there is no meaningful split of authority between the circuit courts of appeals.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87 (emphasis added).

In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court further expounded on its *Brady* holding that bad faith is not required in a claim involving the non-disclosure of evidence the exculpatory value of which is apparent. Specifically, the *Agurs* Court held that:

> Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. (Internal citations omitted). [ ] If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

Agurs, 427 U.S. at 110.

And while *Brady* and *Agurs* dealt with *Brady* claims against prosecutors, this Court has held that *Brady's* due process protections also prohibit other governmental "authorities" from making a "calculated effort to circumvent the disclosure requirements established by *Brady* [ ] and its progeny," *California v. Trombetta*, 467 U.S. 479, 488 (1984).

In following with this Court's decision in *Trombetta*, the Supreme Court reaffirmed its prior holdings that the government's *Brady* obligations apply to both the prosecution and the police and, depending on the nature of the non-disclosed evidence, irrespective of good or bad faith. For example, in *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court held that:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence.

Youngblood, 488 U.S. at 57. As the Sixth Circuit correctly noted, *Youngblood* confirms that "the applicable standard[ ] [depends on] the nature of the evidence at issue, not the title of the government official or whether the challenged conduct relates to the state's failure to disclose evidence rather than its failure to preserve it." Pet. App. 56a. On this point, the Sixth Circuit's holding is completely harmonious with this Court's decisions in *Brady*, *Agurs*, *Trombetta*, and *Youngblood*.

A. Contrary to Petitioner's contention, the Sixth Circuit's decision is completely harmonious with the Supreme Court's *Brady* line of cases which hold that bad faith is not required where the evidence withheld is 'apparently' exculpatory.

Contrary to Petitioner's assertions, the law is clearly established, as the Sixth Circuit found, that either the prosecution or the police violate an individual's due process rights by failing to turn over material evidence the exculpatory value of which is apparent. Indeed, as this Court reiterated in *Illinois v. Fisher*, 540 U.S. 544, 549 (2004), "the applicability of the bad-faith requirement in *Youngblood* depended . . . on the distinction between 'materially exculpatory' evidence and 'potentially useful' evidence."

Collectively, the Supreme Court's prior decisions make clear that in *Brady*-like claims, the important inquiry is whether the withheld evidence is merely potentially exculpatory, or whether the exculpatory nature of the evidence is apparent. If it is apparent that the evidence is exculpatory, this Court has consistently held that an individual challenging the non-disclosure need not show "bad faith." If the non-disclosed evidence is only potentially exculpatory, then a *Brady*-type claim includes a showing of bad faith. This is exactly how the Sixth Circuit applied the law in this case.

Here, Petitioner conflates the Supreme Court's *Brady* line of cases (*Brady*, *Agurs*, *Trombetta*, and

Youngblood) with the separate and distinct concept involving negligent deprivations of due process. Relying on *Daniels v. Williams*, 474 U.S. 327 (1986), Petitioner suggests that this Court has rejected the central premise of the Sixth Circuit's ruling by holding that negligent conduct by governmental officials violates due process. Pet. at 12.

While Petitioner's contention may be correct as a general statement of the law, *Daniels* does not provide the controlling analysis in a case involving the government's failure to turn over evidence the exculpatory value of which is apparent. Such nondisclosure claims, whether arising in the criminal, habeas, or civil context of § 1983, are controlled by this Court's decisions and analyses in *Trombetta* and *Youngblood*, which in turn rested on this Court's opinions in *Brady* and *Agurs*. Contrary to Petitioners' contention, *Daniels* does not operate to apply a different standard in the context of a 1983 *Brady* claim. Indeed, the Sixth Circuit makes this point well in footnote 17 of its opinion:

> Nor is there any justification for imposing a higher burden because Moldowan asserts his due process claim in the § 1983 context. See *Parratt v. Taylor*, 451 U.S. 527, 534, 101 S. Ct. 1908, 68 L.E.2d 420 (1981) ("Nothing in the language of § 1983 . . . limits the statute solely to intentional deprivations of constitutional rights."); see also id. At 535, 101 S. Ct. 1908 ("[Section] 1983 affords a civil remedy for deprivations of federally protected rights . . . without any express

> requirement of a particular state of mind."). Although the Court's decision in *Daniels* overruled other aspects of *Parratt*, it expressly left undisturbed *Parratt's* holding as to § 1983. See *Daniels*, 474 U.S. at 329-30, 106 S. Ct. 662 ("In *Parratt v. Taylor*, we granted certiorari . . . to decide whether mere negligence will support a claim for relief under § 1983 . . . *We concluded that § 1983, unlike its criminal counterpart, 18 U.S.C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. We adhere to that conclusion.*")

Pet. App. 64a n.17 (emphasis added).

The key part of the Court's holding in *Daniels* is found in the above highlighted provision taken from footnote 17 of the Sixth Circuit's opinion; that is, that § 1983 does not require a specific state of mind beyond what is required to prove the underlying constitutional violation. In this case, the underlying constitutional violation is Petitioners' failure to disclose material evidence the exculpatory value of which was apparent.

Thus, Respondent's underlying constitutional claim is that of a *Brady* claim under the Due Process Clause of the Fourteenth Amendment. The task then is to determine whether Respondent must prove bad faith to succeed in his underlying *Brady* claim. Following this Court's *Brady* line of cases, it is clear that Respondent need not demonstrate bad faith to prove

his underlying due process claim because the evidence withheld was exculpatory on its face. This Court need look only to its prior decisions in *Brady*, *Agurs*, *Trombetta*, and *Youngblood* to confirm the correctness of the Sixth Circuit's decision in this regard. And as the Sixth Circuit correctly noted in footnote 17 of its opinion, *Daniels* did not change the analysis that under § 1983 a court must look at the underlying constitutional claim to determine what, if any, state of mind is required.

Contrary to the Petitioner's suggestion, the Sixth Circuit did not change course, at all, from this Court's prior decisions. In fact, the Sixth Circuit followed with exact precision the law that has been handed down by this Court in *Brady* and its progeny. As the Sixth Circuit aptly noted,

> But, where the police are aware that the evidence in their possession is exculpatory, the Supreme Court's decisions in this area indicate that the police have an absolute duty to preserve and disclose that information. *The critical issue in determining whether bad faith is required thus is not whether the evidence is withheld by the prosecutor or the police, but rather whether the exculpatory value of the evidence is "apparent" or not.* See Pet. App. at 52a (emphasis added).

By relying on *Daniels*, Petitioners miss the mark of the proper analysis under which *Trombetta* and *Youngblood* authoritatively hold that Respondent

need not demonstrate bad faith on his underlying constitutional *Brady* claim because the evidence withheld was exculpatory on its face. By glossing over the nature of the withheld evidence and focusing on *Daniels* rather than *Trombetta* and *Youngblood*, Petitioners erroneously contend that the Sixth Circuit's opinion in this matter conflicts with this Court's precedent. It does not. In fact,

> On the contrary, just like *Brady* and *Agurs*, the Court's decision in *Youngblood* confirms that where "material exculpatory evidence" is concerned, the mental state of the government official withholding that evidence is not relevant to determining whether a due process violation has occurred. 488 U.S. at 57-58, 109 S. Ct. 333. In discussing the scope of the police's duty to preserve evidence, the Court contrasted the state's absolute obligation to disclose "material exculpatory evidence" with its much more limited obligation to preserve "potentially useful evidence," holding that a showing of bad faith was required to show a constitutional violation only in the latter context. Id. at 57-58, 109 S. Ct. 333. Pet. App. 55a.

Because the Sixth Circuit's opinion in this case harmoniously follows this Court's decisions, Petitioners' writ for certiorari should be denied.

B. The Court should also deny Petitioner's writ for certiorari because, regardless of whether bad faith is required, the record contains factual disputes as to whether Petitioner Ingles acted in bad faith by failing to disclose the exculpatory evidence at issue.

Even assuming, *arguendo*, that bad faith is a requirement in Respondent's claim, Petitioner's writ for certiorari should also be denied because, as both the lower court's majority and concurrence highlight, there are factual disputes surrounding whether Petitioner Ingles acted in bad faith by failing to disclose the exculpatory evidence at issue. Given such factual disputes, the question of whether bad faith is required is largely academic because, in any event, it will not change the course of these proceedings. Standing alone, these factual disputes make this case less than ideal for Supreme Court review.

As the Sixth Circuit highlighted,

> In any event, even if we were inclined to believe that bad faith was required, we still would not conclude that Detective Ingles is entitled to summary judgment. Because we must read the record in the light most favorable to Moldowan, we conclude that Burroughs' testimony, taken as a whole, provides sufficient evidence for Moldowan's claims to survive summary judgment because a jury could reasonably conclude that Detective Ingles acted in bad faith. Although there is no direct evidence that Detective

> Ingles acted intentionally in withholding these exculpatory statements, Burroughs' testimony, at least when viewed in the light most favorable to Moldowan, provides sufficient evidence for Moldowan's claim to survive summary judgment. Despite Detective Ingles' insistence to the contrary, we lack the jurisdiction to consider his claim that Burroughs never made any such statements to the police. Pet. App. 65a.

Significantly, the concurrence below agreed with the majority that, under either analysis, Respondent may proceed to trial on his claims against Petitioner Ingles based on the factual disputes contained in the record. Pet. App. 92a. ("The caveat, as discussed below, may as a practical matter render insignificant the differences between the majority's approach and my own."); see also Pet. App. 104a (J. Kethledge) (concurring) ("my disagreement with the majority may prove larger in theory than in practice."). As recognized by the concurrence below, the dissent's approach versus the majority's approach complained of by Petitioners presents no real case or controversy and is, in large part, an academic discussion that would be better suited for a case more appropriate on its facts.

C. Petitioners have failed to demonstrate a meaningful split of authority between the circuit courts of appeals as to their interpretation of *Trombetta* and *Youngblood*.

Petitioners also overstate the existence of a circuit split on this issue. For example, Petitioners contend that the Sixth Circuit's decision squarely conflicts with the Eighth Circuit decisions in *White v. McKinley*, 519 F.3d 806 (8th Cir. 2008) and *Villasana v. Wilhoit*, 368 F.3d 976 (8th Cir. 2004). Pet. at 17. Contrary to Petitioners' assertions, there is no such split of authority between the Sixth Circuit and the Eighth Circuit's decisions in *White* and *Villasana*. In fact, the Sixth and Eighth Circuits are in agreement as to the question of law presented herein. As the Sixth Circuit pointed out, both *White* and *Villasana* dealt with evidence that was only potentially exculpatory and thus a showing of bad faith was required in those cases. Pet. App. at 60a n.12 ("Even the decisions from the Eighth Circuit . . . involved evidence that was only potentially useful.").

Furthermore, the Eighth Circuit has specifically recognized that the standard to be applied, one of bad faith or not, depends on the nature of the evidence withheld as set forth in *Trombetta* and *Youngblood*. Specifically, the Eighth Circuit correctly noted the different standards to be applied between potentially exculpatory evidence and evidence the exculpatory value of which is apparent. *Villasana*, 368 F.3d at 978 ("In *Brady*, the Supreme Court held that 'suppression

by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution*.'") (emphasis added); *White*, 519 F.3d 806 (same). Thus, Petitioners' reliance on the Eighth Circuit's decisions in *White* and *Villasana* to demonstrate a circuit split is unsupported by its cited cases.

Petitioners also contend that the Sixth Circuit's opinion in this matter conflicts with precedent from both the Fifth and Ninth Circuits. Again, Petitioners' contention of a circuit split between the Sixth, and Fifth and Ninth Circuits is without merit, or at least overstated. As the Sixth Circuit pointed out in footnote 11 of its opinion below:

> Our reading of *Youngblood* also finds support in the case law of our sister circuits. In *Olszewski v. Spencer*, 466 F.3d 47 (1st Cir. 2006), for instance, the First Circuit declined to resolve this issue, but observed that "[a] variety of other circuits have considered the relationship between *Trombetta* and *Youngblood* and have concluded that (1) the destruction of 'apparently exculpatory' evidence does not require a showing of bad faith but that (2) if the evidence is only 'potentially useful,' a bad-faith showing is required." Id. at 56, 109 S. Ct. 333 (citing *United States v. Moore*, 452 F.3d 382, 388 (5th Cir. 2006)) ("impermissibly withheld evidence must be either (1) material and exculpatory or (2) only potentially useful, in combination with a

> showing of bad faith on the part of the government"); *United States v. Estrada*, 453 F.3d 1208, 1212-13 (9th Cir. 2006) (only requiring a showing of bad faith when the evidence is "potentially exculpatory, as opposed to apparently exculpatory"); *Bullock v. Carver*, 297 F.3d 1036, 1056 (10th Cir. 2002) ("A defendant can obtain relief under the Due Process Clause when he can show that a police department destroyed evidence with 'an exculpatory value that was apparent before [it] was destroyed.' . . . Where, however, the police only failed to preserve 'potentially useful' evidence that might have been exculpatory, a defendant must prove that the police acted in bad faith by destroying the evidence." (Internal citations omitted). Although the decisions of the Fifth, Ninth, and Tenth Circuits are not binding, they lend strong support to our interpretation of this passage from *Youngblood*.

Pet. App. 58a n.11.

As footnote 11 of the Sixth Circuit's opinion makes clear, contrary to Petitioners' suggestion, there is no split of authority between the Sixth, and Fifth and Ninth Circuits. Both the Fifth and Ninth Circuits in *Moore* and *Estrada* recognize the different standards depending on the nature of the evidence withheld. And as the Petitioners themselves point out on page 18 of their Petition, the Eleventh Circuit has not specified a standard for the type of claim raised herein, and thus Petitioners' purported circuit split stands on hollow ground. These cases, relied on by

Petitioners, reveal that there is no well-developed split of authority on the relevant question of law presented herein. To the contrary, these cases show that the circuits are correctly applying the law as set forth by this Court in *Trombetta* and *Youngblood*.

Petitioner's also assert that they are entitled to qualified immunity because, even if there is no requirement that Respondent demonstrate bad faith, the law was not clearly established at the time of their actions to impose liability under § 1983. This argument fails for the simple reason that the Supreme Court has held, as long ago as 1984 and 1988 and before Petitioners' acts giving rise to the instant case, that the Due Process Clause of the Fourteenth Amendment applies to police officers for failing to disclose evidence the exculpatory value of which is apparent, irrespective of their good or bad faith. See *California v. Trombetta*, 467 U.S. 479 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988).

For purposes of qualified immunity, the Supreme Court's decisions in both *Trombetta* and *Youngblood* clearly established as early as 1988 that police officers violate an individual's constitutional rights to due process by failing to disclose evidence the exculpatory value of which is apparent. Based on Respondent's complaint and the summary judgment record in this case, Petitioners' alleged actions taken in 1990 violated clearly established law. The Sixth Circuit's opinion affirming the denial of Petitioner Ingles' defense of qualified immunity provides no basis for review by this Court.

II. Petitioners' writ of certiorari should also be denied because Petitioner City of Warren failed to demonstrate any meaningful split of circuit authority as to pendant, appellate jurisdiction.

Petitioners also contend that the Sixth Circuit's decision finding that it lacked jurisdiction to consider the municipality defendant's appeal conflicts with decisions from other circuit courts of appeals. Specifically, Petitioners contend that the Sixth, Second, and Eleventh Circuits' treatment of pendant, appellate jurisdiction conflict with the decisions of Eighth and Tenth Circuits. See Pet. at 30-31. Petitioners' assertion of a circuit split is without merit. In his complaint, Respondent alleges that the municipal defendant, City of Warren, failed to adequately train its officers as to their constitutional duty to preserve and/or disclose exculpatory evidence. As to Respondent's claim of inadequate training, the Sixth Circuit held that:

> Because we already have determined that the police have a duty to preserve and turn over to the prosecutor evidence that the police recognize as having exculpatory value or where the exculpatory value of the evidence is apparent, *Harris* dictates that the City has a corresponding obligation to adequately train its officers in that regard. Pet. App. 74a-75a.

The Sixth Circuit further concluded that "whether Moldowan has alleged facts sufficient to

satisfy the elements of a claim for municipal liability is beyond the scope of this interlocutory appeal." Pet. App. 75a n.19. On this point, Petitioner City of Warren contests the Sixth Circuit's decision finding that it lacked jurisdiction.

However, this Court's decision in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), makes clear that pendent, appellate jurisdiction is both narrow and discretionary. In *Swint*, this Court vacated the decision of the Eleventh Circuit finding that it did not have jurisdiction to consider the municipal defendant's interlocutory appeal. The Sixth Circuit's ruling in this instance, holding that it lacked jurisdiction over Petitioner City's interlocutory appeal, is entirely consistent with *Swint* and provides no basis for review by this Court.

Furthermore, Petitioners' claim that the circuits are split as to their pendant, appellate jurisdiction is without merit. Petitioners claim that the Sixth, Second, and Eleventh Circuits are split with the Eighth and Tenth Circuits as to the treatment of pendant, appellate jurisdiction in these circumstances. A review of Petitioners' cases reveal, however, that there is no such split.

Petitioners contend that some circuits ask whether the municipalities claims are "inextricably intertwined" with the individual defendants' interlocutory appeal, and if so, pendent, appellate jurisdiction is proper. Petitioners assert that the Eighth and Tenth Circuits follow such a rule, *Sherbrooke v.*

City of Pelican Rapids, 513 F.3d 809 (8th Cir. 2008) and *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009), while the Sixth, Second, and Eleventh Circuits follow a different rule, *Crockett v. Cumberland College*, 316 F.3d 571 (6th Cir. 2003); *Deters v. Lafuente*, 368 F.3d 185 (2d Cir. 2004); and *Harris v. Bd. of Edu.*, 105 F.3d 591 (11th Cir. 1997). See Pet. at 28-32.

A review of the above cited cases reveal that, contrary to Petitioners' assertion, there is no such split of authority on this issue. In all of the cases cited, the circuit courts recognized their pendent, appellate jurisdiction over a municipal defendant's interlocutory appeal whose claims were "inextricably intertwined" with the individual defendants' appeal. In other words, the circuit courts decided each case based on the facts presented. It may be true that the Supreme Court in *Swint* declined to settle "whether or when it may be proper for a court of appeals" to exercise its pendant, appellate jurisdiction. But there is no well-developed split of authority between the circuits as to the proper interpretation of this Court's decision in *Swint*.

Instead, the circuits consider the facts of each case, as the Sixth Circuit did here, to decide whether the claims of the municipal defendant are inextricably intertwined with the claims against the individual defendants. In this case, the Sixth Circuit found that the claims were not so inextricably intertwined as to justify the exercise of its pendant, appellate jurisdiction. Specifically, the Sixth Circuit held that:

> We also disagree with the notion that Moldowan cannot make out a claim against the City under Count XXVI because he cannot show any constitutional violation on the part of Officer Schultz. Although Officer Schultz did not violate Moldowan's constitutional rights by destroying the case evidence, Moldowan nevertheless may be able to show that: "the individual with final policy-making authority who directed . . . the destruction of the evidence" was aware of the materiality of the evidence, and thus did violate Moldowan's rights under *Trombetta* and *Youngblood*. Thus, at this stage at least, we are not inclined to grant summary judgment on that basis. Pet. App. 77a.

As the Sixth Circuit makes clear, it did not find that Respondent's failure to preserve claim against Petitioner City was dependent on Respondent's claim against the individual who destroyed the evidence in question. Having so concluded, the Sixth Circuit's decision was proper and consistent with this Court's precedents.

CONCLUSION

There are no compelling reasons to grant the petition for writ of certiorari. Consistent with this Court's decisions in *Brady*, *Agurs*, *Trombetta*, and *Youngblood*, the Sixth Circuit held that a police officer violates an individual's due process rights by failing to disclose evidence the exculpatory value of

which is apparent. The Sixth Circuit's decision on this point is completely consistent with Supreme Court precedent, and contrary to Petitioners' contentions, there is no meaningful or well-developed split of authority between the circuit courts of appeals on this point of law. Furthermore, there is no split of authority as to the circuit courts' pendant, appellate jurisdiction.

For these reasons, Respondent asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

CITY OF WARREN ET AL.,
Petitioners,

v.

JEFFREY MICHAEL MOLDOWAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Sixth Circuit's decision adopts an "*unwavering*" and "*absolute*" duty for police officers to disclose any and all "apparently" exculpatory evidence uncovered in months- and years-long investigations. Pet. App. 52a, 64a (emphases in original). The court of appeals avowedly imposed an "additional burden" – its new super-*Brady* duty for police officers to disclose "apparent" (but not material) exculpatory evidence, even though the prosecutor would properly decline to hand over to the defense that *same* piece of evidence. *Id.* 62a & n.15. Because that ruling conflicts with this Court's precedents and with decisions of four other circuits by omitting any requirement that the officer be held liable only if he acted in bad faith, this Court's intervention is plainly warranted.

1. The Sixth Circuit's decision conflicts with this Court's precedents articulating the government's due process obligation to disclose exculpatory evidence.

a. The ruling below conflicts with this Court's holding that innocent or negligent conduct does not violate the Due Process Clause. *See* Pet. 12-13 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1988); *Daniels v. Williams*, 474 U.S. 327, 328-29 (1986)). There is no merit to respondent's contention that this Court has implied an exception to that bedrock constitutional principle by imposing an absolute obligation on all governmental actors (including the police) to disclose exculpatory evidence. Respondent himself quotes, BIO 6, this Court's precedents holding that the duty of disclosure

addresses "suppression by the prosecutor," *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and the obligations "of the prosecutor," *United States v. Agurs*, 427 U.S. 97 (1976). Because of the special obligations and training of prosecutors, "the moral culpability, or the willfulness, of the prosecutor" need not be proven in any individual case because, "[i]f evidence highly probative of innocence is in his file, he should *be presumed* to recognize its significance even if he has actually overlooked it." *Agurs*, 427 U.S. at 110 (emphasis added).

Prosecutors are thus trained to understand the legal significance of evidence within the framework of a criminal trial. In stark contrast, police officers lack the structural role in the criminal justice system, the day-to-day involvement in the prosecutorial process, and the training to make the judgment that any given piece of evidence is materially exculpatory. Officers, whose work is commonly confined to select aspects of a criminal prosecution, also generally lack the overview of the criminal case and collective knowledge of the evidence that is necessary to assess the exculpatory character of individual bits of evidence.

This Court has accordingly rejected the Sixth Circuit's attempt to extend *Brady*'s strict liability regime to the police. Respondent fails to acknowledge the holding of *Kyles v. Whitley*, 514 U.S. 419 (1995), that it is "the individual prosecutor," not the police, who bears responsibility for the withholding of evidence, notwithstanding the officer's failure to "disclose[] even to the prosecutor" exculpatory evidence "until after trial." *Id.* at 437-38. The prosecutor, this Court held, "has a duty to learn

of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437. The due process constraint on police officers is instead, as respondent himself points out, that they may not engage in a "*calculated* effort to circumvent the disclosure requirements established by *Brady* [] and its progeny." *California v. Trombetta*, 467 U.S. 479, 488 (1984) (emphasis added), *quoted in* BIO 7.

b. The Sixth Circuit's imposition upon police officers of an unprecedented due process obligation not merely to retain evidence, but to identify and disclose evidence with apparent exculpatory value, dramatically alters this well-settled regime. Although a prosecutor's breach of the *Brady* disclosure obligation may result in the overturning of a criminal conviction, absolute immunity protects against the burdens of civil litigation brought by disaffected and obstructionist criminal defendants. *Imbler v. Pachtman*, 424 U.S. 409 (1976). By contrast, because police officers lack absolute immunity, the Sixth Circuit's holding dramatically expands the prospect that claims alleging a failure to disclose evidence will trigger civil lawsuits, with their attendant massive costs and prospects of crushing damage awards based on good faith police conduct.

This Court's review is warranted because the disposition of the question presented controls the liability of the police officers and their municipal employers with respect to millions of pieces of evidence collected in hundreds of thousands of investigations annually. The petition and *amicus* briefs collect numerous cases demonstrating that a plaintiff's obligation to prove an officer's "bad faith" is

a critical bulwark against an onslaught of litigation. Pet. 15-16 n.1; *see also* Nat'l Ass'n of Police Orgs. Br. 14-15. By contrast, "the Sixth Circuit's rule will allow any plaintiff to enter federal court and sue individual officers and municipal governments on an unsubstantiated allegation that is untethered from any actual evidence of bad faith." Nat'l Fraternal Order of Police Br. 11; *cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). "Given the frequency with which the issue arises, allowing the Sixth Circuit's decision to stand would lead to a flood of new litigation against police officers and impose an enormous financial burden on the municipalities that employ and indemnify them." Nat'l Ass'n of Police Orgs. Br. 4.

c. This case is a perfect illustration. There is no evidence other than Burroughs' own doubtful assertion that he ever spoke to a police officer. In the decade between the underlying crime and Moldowan's retrial, Burroughs made five separate statements, but *never* claimed that he had spoken with the police. *See* Nat'l Ass'n of Police Orgs. Br. 9-10. At the retrial, Burroughs for the first time asserted that he had spoken with an unidentified male police officer; Burroughs did not know, for example, whether the officer was from Detroit or the City of Warren. Retrial Tr. 92-93. Then in his deposition in this later suit – *thirteen years* after the crime – Burroughs for the first time recalled that he actually had not only spoken with an officer (a fact omitted from his first five statements), but that the officer was a "white," "plainclothes" detective "of the Warren Police Department" who was in his "early forties" (none of which he seemingly recalled as recently as his testimony during the retrial). Burroughs Dep. 34-36. Even now, Burroughs does

not identify Detective Ingles as the officer with whom he supposedly spoke, a fact that Ingles categorically denies.

Even assuming that the conversation ever occurred, there is no evidence that Ingles either purposefully suppressed the statement or harbored any ill will towards Moldowan or performed less than admirably as a detective in this or any other investigation. Moldowan thus offers no basis for the jury to conclude that Ingles acted in bad faith, rather than finding, for example, that Ingles either (i) determined that Burroughs (who was not a witness to the assault) was not credible in light of his demeanor and the direct evidence confirming the victim's account, *see* Pet. 3-5, or (ii) failed to provide the statement to prosecutors out of negligence rather than malice. *See infra* (discussing holding of Eighth and Eleventh Circuits that no inference of bad faith arises in indistinguishable circumstances).

2. The one place where respondent and the court of appeals part company is that the Sixth Circuit, at least, candidly acknowledged that its decision created an inter-circuit split. Pet. App. 44a, 50a. The pressing importance of that conflict is demonstrated by the *amicus curiae* briefs filed by organizations which together represent hundreds of thousands of law enforcement officials across the nation who (along with their municipal employers) now find themselves subject to inconsistent liability rules under the Constitution and the threat of crushing personal damages liability based solely on accidents of geography.

Respondent cherry-picks two Eighth Circuit cases that he says involved "only potentially exculpatory"

evidence. BIO 15. That is debatable, but it is also irrelevant because the argument ignores that the Eighth Circuit has applied its bad faith standard in an uninterrupted line of five decisions, several involving evidence that was plainly exculpatory, *see* Pet. 17 (collecting cases), and has expressly ruled that "bad faith" must be shown even in cases involving "materially favorable evidence," *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004). Respondent's observation that "*the prosecution*" must disclose evidence "irrespective of the good faith or bad faith of *the prosecution*," BIO 15-16 (quoting *Villasana*, 368 F.3d at 978) (emphases added), proves petitioners' point. As the Eighth Circuit has repeatedly held, it is the prosecutor, not the police, who can and does bear the burden of *Brady* compliance, because it is the prosecution that conducts the criminal case, sees the evidence in its entirety, and has the legal training and front-seat management of the criminal case to make the required constitutional assessment.

The Sixth Circuit also recognized a square conflict with the Eleventh Circuit, which has expressly held that police officers' innocent or negligent failure to provide evidence to prosecutors does not violate due process. Pet. App. 44a; Pet. 21-22. The fact that the Eleventh Circuit has never ruled for a plaintiff that officers violated due process by failing to disclose evidence, and accordingly "has not specified a standard" to govern such claims, BIO 17, does not change the fact that the Eleventh Circuit would have dismissed this case or at least remanded it for proof of bad faith.

Respondent ignores that the Fifth and Ninth Circuits hold that the strict liability standard applicable to prosecutors does not extend to claims against police officers. *See* Pet. 18. Instead, he repeats the Sixth Circuit's mistaken invocation of inapposite cases addressing the officers' distinct obligation to *retain* evidence, which the police can satisfy merely by preserving all the seemingly relevant material they collect, in contrast to the very different obligation imposed by the Sixth Circuit to assess the constitutional significance of individual pieces of evidence and discern a duty to affirmatively disclose evidence to a prosecutor. *See* BIO 7; Pet. App. 58a n.11 (citing *United States v. Estrada*, 453 F.3d 1208, 1212-13 (9th Cir. 2006) ("Estrada argues that his due process rights were violated by the government's bad faith destruction of the evidentiary value of the truck"); *United States v. Moore*, 452 F.3d 382, 387 (5th Cir. 2006) ("Moore reasserts a violation of *Brady v. Maryland*, pointing to the government's failure to preserve 344 tape recordings of conversations between himself and Williams or Tunde.")).

3. Even assuming this Court's existing precedent does not preclude an extension of *Brady's* strict liability regime from prosecutors to police officers, neither this Court nor any court of appeals had ever held (prior to the decision here) "that the Due Process Clause of the Fourteenth Amendment applies to *police officers* for failing to disclose evidence the exculpatory value of which is apparent, irrespective of their good or bad faith." *Contra* BIO 18 (emphasis added). Respondent does not defend the Sixth Circuit's reliance on three appellate rulings, each of which are inapposite or affirmatively held that

officers are liable only for bad faith conduct. *See* Pet. 24-25.

In citing decisions involving bad faith by police officers to impose a strict liability obligation, the Sixth Circuit failed even to pay lip service to this Court's holding that qualified immunity applies unless the asserted right is clearly established "in a more particularized, and hence more relevant, sense." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (internal citation omitted); see Pet. 25-26. The Sixth Circuit equally ignored the rule that, when (as here) the asserted legal rule is contrary to the majority rule in the federal courts, qualified immunity must be granted because "it is unfair to subject police to money damages for picking the losing side of the controversy." *Pearson v. Callahan*, 129 S. Ct. 808, 823 (2009); *see* Pet. 25-26.

Furthermore, respondent ignores altogether the head-on conflict between the Sixth Circuit's decision denying immunity and the Third Circuit's holding that an evidence-suppression claim may not proceed against an officer for conduct that predates this Court's 1995 ruling in *Kyles*, *supra*, as well as the Eighth Circuit's holding that qualified immunity attaches unless the officer "deliberately" suppressed exculpatory evidence. *See* Pet. 27-28 (discussing *Gibson v. Superintendent*, 411 F.3d 427, 444 (3d Cir. 2005); *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008)). Such patchwork decisional law on qualified immunity deprives police officers within the Sixth Circuit of the very security from unpredicted and unpredictable developments in the law that this Court's precedents were designed to provide.

4. The petition and *amicus* briefs fully anticipated respondent's reliance, BIO 13, on the Sixth Circuit's suggestion, Pet. App. 65a, that respondent conceivably could have prevailed at trial if the court of appeals hypothetically had not rejected the "bad faith" standard applied by other circuits. *See* Pet. 19-23; Nat'l Ass'n of Police Orgs. Br. 9-13; Nat'l Fraternal Order of Police Br. 4-7, 19. The problem with respondent's reliance on such dicta, of course, is that no one will never know because, under the court's decision here – unlike the rule in four other circuits – no jury will ever be asked to find bad faith as a condition of imposing liability, and no motion to dismiss or for summary judgment in this or any other case in that circuit will ever be granted due to an insufficient showing of bad faith. At the very most, respondent's argument suggests only that this Court could conclude that this case should be remanded for trial under the correct "bad faith" standard; it is not a basis for denying review of the court of appeals' actual holding and the circuit conflict it creates.

Further, the Sixth Circuit majority suggested that respondent could have shown bad faith at trial only because that court takes an erroneously lenient view of the "bad faith" requirement, permitting this suit to proceed to trial based on the mere absence of an alleged statement from the prosecution's files. *See supra.* The Sixth Circuit indicated that the jury would be permitted to infer bad faith from the bare fact that the statement of one witness was not provided to prosecutors. Respondent's "evidence" of Ingles' supposed "bad faith" is thus limited to a very weak inference: respondent would seek to prove one fact (that Burroughs made a statement to Ingles) and

then would ask the jury to infer *all* the remainder of his case (that Burroughs withheld the statement from prosecutors and that he did so with malice). Allowing a complaint to go forward on that basis, without a shred of evidence of malice or ill will, collapses the distinction between negligence and bad faith, and leaves no basis for early disposition of meritless cases under *Iqbal*, *supra*.

Other courts of appeals – including particularly the Eighth and Eleventh Circuits – have squarely held that the mere failure to provide evidence to prosecutors does not give rise to a triable claim that the officer acted in bad faith, even when that evidence is so significant that it causes the defendant's conviction to be overturned. *See* Pet. 21-23. The Sixth Circuit's dicta thus compounds, rather than eliminates, the circuit conflict and underscores the significant contribution that this Court's clarification and application of the correct bad-faith standard would make to the efficient disposition of lawsuits against police officers and municipalities. Notably, under respondent's approach, *no* case will ever be an appropriate vehicle for resolution of this recurring circuit conflict because every case raising the issue, by definition, will involve the same failure to disclose evidence and thus would permit the same daisy-chain inference proffered here in thousands of investigations involving millions of pieces of evidence every year.

5. Lastly, certiorari is warranted to resolve an important and recurring circuit conflict concerning the scope of pendent jurisdiction over municipal defendants' claims on qualified immunity appeals. The Sixth Circuit held with respect to respondent's

evidence-destruction claim that the only individual municipal defendant (officer Michael Schultz) was entitled to qualified immunity. As the Sixth Circuit itself acknowledged, Pet. App. 75a n.19, despite every opportunity, respondent has not identified any individual municipal defendant who ordered the destruction of evidence or any municipal policy calling for its destruction. Although the City is accordingly entitled to summary judgment as a matter of law, *see City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), the court of appeals held that "whether Moldowan has alleged facts sufficient to satisfy the elements of a claim for municipal liability is beyond the scope of this interlocutory appeal." Pet. App. 75a n.19.

The Sixth Circuit's jurisdictional holding is consistent with decisions of the Second and Eleventh Circuits but squarely conflicts with the firmly established precedent of the Eighth and Tenth Circuits, both of which have repeatedly held that they have pendent appellate jurisdiction when the claim against the municipality would have to proceed without liability on the part of any individual municipal defendant. *See* Pet. 31-33 (collecting cases). Moldowan's contention that the courts broadly agree that they have jurisdiction when the municipal defendant's argument is "'inextricably intertwined' with the individual defendant's appeal," BIO 21, is beside the point. The conflict presented in this case is over the definition of "inextricably intertwined" in the recurring circumstance in which no individual could be held liable.

Although the Sixth Circuit refused to exercise jurisdiction, respondent notes the court's dictum that

it would not be "inclined to grant summary judgment" to the City on the basis of Schultz's own qualified immunity because (despite the absence of any supporting evidence) Moldowan might identify at trial a municipal policymaker who authorized the destruction. BIO 22 (citing Pet. App. 77a n.20). But the whole point of summary judgment is to foreclose trial when the plaintiff has not identified any such hypothesized evidence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). It is precisely because respondent has *no* evidence of any municipal policy or action by a municipal policymaker that the municipality is entitled to summary judgment; such an evidentiary deficiency certainly does not entitle the plaintiff to a trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION OF NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, ASSOCIATION OF PROSECUTING ATTORNEYS, AND MICHIGAN TOWNSHIPS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, ASSOCIATION OF PROSECUTING ATTORNEYS, AND MICHIGAN TOWNSHIPS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici the National Association of Police Organizations, Inc. ("NAPO"), the Michigan Association of Chiefs of Police ("MACP"), the Association of Prosecuting Attorneys ("APA"), and the Michigan Townships Association ("MTA") respectfully move, pursuant to Rule 37.2(b) of the Rules of this Court, for leave to file a brief *amicus curiae* in support of petitioners. This motion is necessary because on May 3, 2010, counsel for respondent Moldowan declined the timely written request for consent to the filing of this brief.

The NAPO is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action, and education. Founded in 1978, the NAPO now represents more than 2,000 police units and associations, 241,000 sworn law enforcement officers, 1,000 retired officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

The MACP, founded in 1924, represents over 1,000 police chiefs, directors of public safety, and command officers from village, township, city, county, state and federal law enforcement agencies. It seeks to advance the science of police administration, foster police cooperation, provide training and educa-

tion, and encourage legislation for the benefit of the citizens of State of Michigan and law enforcement in general.

The APA is a national organization that represents all prosecutors. It provides resources such as training and technical assistance in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make communities safer. The APA acts as a forum for the exchange of ideas, allowing prosecutors to collaborate with each other and other criminal justice partners. The APA also advocates for prosecutors on issues related to the administration of justice.

The MTA is a Michigan non-profit corporation whose membership consists of more than 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, information, and guidance to and among township officials to enhance efficient and knowledgeable administration of township government services under Michigan laws and statutes.

Amici believe that their views will provide a useful supplement to the presentations of the parties. A clear, consistent interpretation of the liability standard for police officers with respect to their duty to inform prosecutors about potentially exculpatory evidence is of paramount importance to *amici*'s members. In particular, the law enforcement officers whom *amici* represent need this Court's guidance on the circumstances that may lead to personal liability for alleged violations of criminal defendants' constitutional right of due process. Previously, such liability has required, at a minimum, some kind of intentional conduct.

Amici are greatly concerned by the holding of the Sixth Circuit that a police officer can be found liable for damages for failing to disclose evidence with "apparent" exculpatory value *irrespective of the officer's mental state*. Under the Sixth Circuit's standard, a negligent or inadvertent failure to disclose evidence is just as culpable as a deliberate or bad-faith failure to disclose. This is an unprecedented expansion of the scope of state actors' liability under 42 U.S.C. § 1983, which previously has provided for liability only where the challenged conduct was more than negligent. Moreover, the Sixth Circuit's negligence standard complicates a legal landscape in which the circuit courts already have divergent views on the appropriate standard. This Court's intervention is necessary to impose a uniform nationwide standard.

Respectfully submitted.

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BRIEF OF NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, ASSOCIATION OF PROSECUTING ATTORNEYS, AND MICHIGAN TOWNSHIPS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

As set forth in the accompanying motion, *amici* are organizations that seek to advance effective law enforcement techniques and protect the interests of law enforcement officials and municipalities.

The NAPO is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action, and education. Founded in 1978, the NAPO now represents more than 2,000 police units and associations, 241,000 sworn law enforcement officers, 1,000 retired officers, and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

The MACP, founded in 1924, represents over 1,000 police chiefs, directors of public safety, and command officers from village, township, city, county, state and federal law enforcement agencies. It seeks to advance the science of police administration,

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. Respondent Moldowan denied consent through counsel on May 3, 2010.

foster police cooperation, provide training and education, and encourage legislation for the benefit of the citizens of State of Michigan and law enforcement in general.

The APA is a national organization that represents all prosecutors. It provides resources such as training and technical assistance in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make communities safer. The APA acts as a forum for the exchange of ideas, allowing prosecutors to collaborate with each other and other criminal justice partners. The APA also advocates for prosecutors on issues related to the administration of justice.

The MTA is a Michigan non-profit corporation whose membership consists of more than 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, information, and guidance to and among township officials to enhance efficient and knowledgeable administration of township government services under Michigan laws and statutes.

SUMMARY OF ARGUMENT

Thirteen years after the abduction and brutal assault of Maureen Fournier, a witness at the re-trial of Jeffrey Moldowan, one of the alleged assailants, stated for the first time that shortly after the assault he gave a statement to an unidentified police officer. The witness, Jerry Burroughs, allegedly told the officer that he had observed four African-American males standing over Fournier's injured body in a Detroit street on the night she was abducted from neighboring Warren. No such statement ever

reached the files of the prosecutors in the case against Moldowan, a Caucasian who was convicted in 1991. Moldowan's conviction was vacated after new evidence came to light and key trial testimony was recanted, and he was ultimately acquitted in a second trial.

Burroughs—who does not claim to have witnessed the kidnapping or the assault—never identified, and admits that he cannot now identify, the officer to whom he says he gave his statement. But more than a decade after the events Moldowan asks a federal court to infer that it was Detective Donald Ingles of the Warren Police Department, against whom he has asserted civil claims. Based on that unsupported inference and the facts described above, the Sixth Circuit held that Ingles does not have qualified immunity for allegedly failing to bring Burroughs's statement to the attention of prosecutors. According to the Sixth Circuit, it is a clearly established rule of constitutional law that "[w]here the exculpatory value of a piece of evidence is 'apparent,' the police have an *unwavering* constitutional duty to preserve and ultimately disclose that evidence." Pet. App. 63a. The Sixth Circuit further held that no showing of bad faith by the officer is required: a due-process violation may be established by a merely negligent or innocent failure to bring evidence to a prosecutor's attention. *Id.* at 63a-64a.

The Sixth Circuit thereby created a new rule that conflicts with the law set forth by this Court and followed by four other circuits. If allowed to stand, this rule will lead to an upsurge of constitutional litigation against police officers, as well as a massive new risk for municipalities of claims blaming them for innocent or merely negligent conduct by officers.

Such a result would place an enormous burden on police officers, who are on the front lines of investigating crimes and ensuring that justice is done. The scope of police officer liability with respect to potentially exculpatory evidence is an important and recurring issue, and this Court's intervention is necessary to confirm the appropriate standard.

ARGUMENT

This Court should grant the petition and correct the Sixth Circuit's erroneous view of the standard governing civil liability of a police officer under 42 U.S.C. § 1983 on a due process claim of withholding exculpatory evidence.

The Sixth Circuit's standard, which imposes liability on an officer regardless of bad faith or intent in failing to disclose "apparently" exculpatory evidence to prosecutors, conflicts with the longstanding principle that a constitutional violation requires conduct more culpable than simple negligence.

The Sixth Circuit's passing suggestion that Ingles would not be entitled to summary judgment even under a bad-faith standard is equally unsupportable. The record in this case shows negligence at most, making the Sixth Circuit's refusal to require proof of bad faith decisive with respect to whether respondent's claims against Ingles may proceed.

A police officer's liability for withholding potentially exculpatory evidence is an important and recurring issue on which this Court's guidance is needed. Given the frequency with which the issue arises, allowing the Sixth Circuit's decision to stand would lead to a flood of new litigation against police officers and impose an enormous financial burden on the municipalities that employ and indemnify them.

Just as troubling, this risk of increased liability would have a chilling impact on the exercise of municipal law enforcement.

I. The Sixth Circuit's New Standard Cannot Be Squared With This Court's Precedents.

The Sixth Circuit's decision contravenes this Court's unequivocal teaching that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels* v. *Williams*, 474 U.S. 327, 328 (1986); see *County of Sacramento* v. *Lewis*, 523 U.S. 833, 849 (1998) ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"). Contrary to these clear pronouncements, the Sixth Circuit would allow liability "regardless [of] whether a *** § 1983 plaintiff can show that the evidence was destroyed or concealed in 'bad faith'" (Pet. App. 63a-64a)—which is to say, even if the destruction or concealment was innocent or negligent. See also Pet. App. 53a (the "critical issue *** emphatically is not the mental state of the government official who suppressed the evidence").

Whether the law requires a plaintiff to allege and prove bad faith or simply negligence is no small issue. This Court has consistently refused in a variety of contexts to adopt a strict liability or negligence standard for constitutional violations by police officers or other state actors.

For example, this Court held last term that the exclusionary rule does not apply to evidence obtained in violation of the Fourth Amendment where the police conduct was merely negligent. *Herring* v. *United States*, 129 S. Ct. 695, 702 (2009). As the Court explained, "police conduct must be sufficiently delib-

erate that exclusion can meaningfully deter it. *** [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Ibid.* See also *United States* v. *De Leon-Reyna*, 930 F.2d 396, 397 (5th Cir. 1991) (en banc) (negligent police conduct did not "truncate[] the good faith exception to the exclusionary rule").

This Court similarly has refused to permit constitutional claims based on mere negligence for violations of the Eighth Amendment by prison officials, instead requiring "deliberate indifference." *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994); *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976). In *Estelle*, which first set forth the "deliberate indifference" standard, the Court explained that "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim." 429 U.S. at 106; see *id.* at 105-106 ("an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind'"). In *Farmer*, the Court further clarified that to be liable, an official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." 511 U.S. at 837. Under this standard, negligent conduct *cannot* lead to liability. See *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986) ("To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve *more than ordinary lack of due care* for the prisoner's interests or safety") (emphasis added).

The lower courts have followed this clear directive. *Gayton* v. *McCoy*, 593 F.3d 610 (7th Cir. 2010)

("Evidence that the official acted negligently is insufficient to prove deliberate indifference"); *Hernandez* v. *Keane*, 341 F.3d 137, 144 (2d Cir. 2003) ("'Deliberate indifference' describes a mental state more blameworthy than negligence"); *McElligott* v. *Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) (deliberate indifference is "conduct that is more than mere negligence"). The same is true when the claim lies under the Fourteenth, rather than the Eighth, Amendment. *E.g.*, *Pabon* v. *Wright*, 459 F.3d 241, 251 (2d Cir. 2006) ("simple negligence will not suffice").

Likewise, negligent use of excessive force is insufficient to establish a violation of the Fourth Amendment's prohibition on unreasonable seizures. *Brower* v. *County of Inyo*, 489 U.S. 593, 596 (1989) (seizure must be "willful" to violate Fourth Amendment); *McCoy* v. *City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005) ("A Fourth Amendment seizure requires an intentional act by an officer"); *Howerton* v. *Fletcher*, 213 F.3d 171, 175 n.4 (4th Cir. 2000) ("the exertion of force amounting to a Fourth Amendment seizure [must] be *intentional*"); *Apodaca* v. *Rio Arriba County Sherriff's Dept.*, 905 F.2d 1445, 1447 (10th Cir. 1990) ("one seized unintentionally does not have a constitutional complaint"); *Gutierrez* v. *Mass. Bay Transp. Auth.*, 772 N.E.2d 552, 558 (Mass. 2002) ("An accidental use of force, even if occurring during the course of an arrest or other physical restraint of a person, does not constitute a seizure because it is not a 'means intentionally applied' to obtain control of the arrestee").

Nor is negligence, or anything close to it, sufficient to state a claim under substantive due process against the police; rather, a plaintiff must allege conduct that shocks the conscience. "It should not be

surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability." *Lewis*, 523 U.S. at 848; see *Walter* v. *Pike County*, 544 F.3d 182, 193 (3d Cir. 2008) (officers' "approval of the arrest plan was at most negligent, and does not shock the conscience"); *King ex rel. King* v. *E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007) (to shock the conscience "in all cases, the conduct must be more culpable than mere negligence"); *Moore* v. *Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006) ("It is well settled that negligence is not sufficient to shock the conscience"); *Roach* v. *City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989) (officer's "negligence in pursuing" vehicle "does not rise to the level of gross negligence and, therefore, most certainly does not rise to the level of conduct which would sustain a claim under section 1983"); *Dunster* v. *Metro. Dade County*, 791 F.2d 1516, 1518 (11th Cir. 1986) ("Because the plaintiffs' case was premised on a theory of negligence, the jury verdict cannot be sustained under the Fourteenth Amendment").

In short, the law as set forth by this Court and followed by the lower courts is clear and well established: only *deliberate* conduct can violate the Constitution. The Sixth Circuit's unprecedented expansion of liability for constitutional torts cannot be reconciled with existing law, which relegates negligence to the sphere of common-law tort claims. State actors should not be subject to the threat of personal liability under § 1983 for their innocent mistakes or negligent acts.

II. Application Of The Proper Standard In This Case Would Require Summary Judgment For Detective Ingles.

After creating a new standard for constitutional claims against police officers, the Sixth Circuit ultimately hedged its bet by suggesting in passing that, even under a bad-faith standard, "a jury could reasonably conclude that Detective Ingles acted in bad faith." Pet. App. 65a. The court thus implied that its wholesale revision of the law was of little consequence because the outcome would be the same either way. In fact, the Sixth Circuit's new "negligence is sufficient" standard was dispositive because here, as in many cases, the record plainly would require summary judgment for the officer under the proper standard.

Moldowan contends that Ingles failed to disclose to prosecutors a statement that Burroughs allegedly gave about a month after the assault to an unknown police officer who was canvassing his parents' neighborhood for leads. According to Burroughs, on the night of Fournier's assault, he observed four African-American men standing over a naked woman on a Detroit street and then driving away. Pet. App. 10a. Burroughs also says that he later heard two of the same men bragging about the assault, and that (contrary to her testimony at Moldowan's first trial) Fournier frequented a crack house in the same Detroit neighborhood. Pet. App. 10a.

Burroughs's testimony about his observations appears at the following points in the record: the handwritten affidavit procured by the Moldowan family's private investigator in November 1991, after Moldowan's first trial; a second affidavit prepared more than eight years later; Burroughs's live testi-

mony at Moldowan's retrial in January 2003; and his 2006 deposition in these civil proceedings. In all this, Burroughs *never* identifies Detective Ingles as the police officer to whom he spoke; indeed, Burroughs did not tell anyone that he had talked to police until he was on the stand at Moldowan's re-trial.

- Burroughs's two-sentence 1991 affidavit does not mention that he ever told police about his observations. Burroughs Aff. 11/6/91.
- Burroughs's 1999 affidavit again fails to mention that he ever spoke with police about what he allegedly observed. Indeed, it attests that Burroughs was "too afraid" to assist the woman he saw or call 911. Burroughs Aff. 4/5/99.
- At Moldowan's retrial, Burroughs testified for the first time that "a month or so" after Fournier's assault, he spoke to police who were "in the neighborhood trying to see *** what they could find out." He said he told a male officer his "story," and "he just acted like I [was] saying nothing." He did not know the officer's name or even whether he was from Detroit or Warren. Re-trial Tr. 92-93.
- In his deposition in this civil case, Burroughs elaborates for the first time that a "white," "plainclothed" detective "of the Warren Police Department," who appeared to be in his "early forties," interviewed him at his mother's home about a month after Fournier's assault. Burroughs Dep. 34-36. Though the detective asked if Burroughs

> knew anything about the incident, the detective "acted like he didn't want to hear it," "didn't write down anything," and did not ask Burroughs for his name or contact information. *Id.* at 37, 127-28. Burroughs acknowledges that he previously told his story to a private detective, Mr. Spencer, hired by the Moldowan family. *Id.* at 47-48. On the three occasions he spoke with Spencer beginning in 1991, Burroughs never mentioned that he had talked to the police. He "forgot about it until we went to court"—nearly 13 years after the alleged conversation took place. *Id.* at 130; see *id.* at 48, 56.

According to the Sixth Circuit, this tissue-thin evidence provides a sufficient basis on which a jury could conclude that (1) Burroughs spoke to a police officer in connection with the crimes against Fournier; (2) the officer to whom Burroughs allegedly spoke was Detective Ingles and not any other officer from Detroit or Warren who investigated the Fournier assault; and (3) Ingles withheld Burroughs's statement from prosecutors, despite its "apparent" exculpatory value, out of "bad faith" rather than inadvertent or negligent conduct. The Sixth Circuit did not explain its suggestion that such inferences could be plausible based on this record.

Even if one assumes (as Ingles has for the limited purpose of summary judgment) that he spoke to Burroughs in 1991 and never relayed Burroughs's statements to prosecutors, there is not a scintilla of evidence that Ingles acted in bad faith. The Sixth Circuit certainly did not point to any, instead simply invoking "Burroughs' testimony, taken as a whole."

Pet. App. 65a. But given that Burroughs cannot even identify the officer with whom he allegedly spoke, his testimony alone cannot illuminate Detective Ingles's state of mind. Nor can bad faith be inferred from the simple fact that prosecutors were unaware of Burroughs's alleged statement. "Bad faith" in the context of withholding evidence entails the "inten[t] to deprive the defendant of a fair trial." *White* v. *McKinley*, 519 F.3d 806, 814 (8th Cir. 2008). Further, under *any* standard requiring more than negligence, whether dubbed "bad faith" or not, the Sixth Circuit's conclusion could not stand. See *Tennison* v. *City & County of San Francisco*, 570 F.3d 1078, 1088 & n.5 (9th Cir. 2009) (officer must have "acted with deliberate indifference to or reckless disregard for the accused's rights or for the truth"); *Porter* v. *White*, 483 F.3d 1294, 1307-1308 (11th Cir. 2007) (negligence is insufficient); *Hart* v. *O'Brien*, 127 F.3d 424, 446-447 (5th Cir. 1997) (officer must "*deliberately* fail[] to disclose" evidence that is "*patently* exculpatory") (emphasis added), abrogated on other grounds, *Kalina* v. *Fletcher*, 522 U.S. 118 (1997).

Burroughs's testimony, even "taken as a whole," says nothing that could support the conclusion that Ingles (assuming Burroughs actually spoke to an officer and that the officer was Ingles) *deliberately* withheld evidence from prosecutors or *intended* to deny Moldowan a fair trial. At most it could be inferred that the officer *neglected* to inform prosecutors that he spoke to Burroughs—who by his own account did not witness the crimes and "didn't want to talk about this matter" with police. Burroughs Dep. 38. Especially given the victim's confident and specific identification of her attackers (including Moldowan) before and at Moldowan's first trial, Pet. App. 6a-8a, bad faith seems a dubious hypothesis for a police of-

ficer's failure to forward the vague statement of a reticent non-witness about the same events—if indeed such a statement was made.

It is the plaintiff's burden to establish that something more than negligence was at play, a burden that could not be met on this record. Accordingly, and contrary to the Sixth Circuit's suggestion, the court can have rejected Ingles's entitlement to summary judgment *only* under its newly minted "negligence is sufficient" standard. And, because that standard does not pass muster under this Court's precedents, the Sixth Circuit's decision must be reversed.[2]

III. Police Officers' Liability For Withholding Exculpatory Evidence Is An Important And Recurring Issue.

This Court's intervention is further and immediately needed to stem an inevitable tide of new litigation against police officers and the chilling of their pursuit of their law enforcement duties.

Section 1983 claims against police officers for allegedly withholding potentially exculpatory evidence from prosecutors are not uncommon. But two primary bulwarks have prevented such litigation from overwhelming the resources of police departments and municipalities. First, this Court has made clear that the duty to obtain and disclose exculpatory evi-

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[2] At the very least, for purposes of qualified immunity, the right to evidence of "apparent" exculpatory value negligently withheld by police officers was not clearly established in 1991, the time of the investigation and first trial. "Retroactive application of fresh precedent has no place in fixing the standard of conduct for damage suits under Section 1983." *Slate* v. *McFetridge*, 484 F.2d 1169, 1174 (7th Cir. 1973).

dence lies solely with the prosecution. *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995). Prosecutors, of course, are immune from civil liability for conduct in the course of their official duties. *Imbler* v. *Pachtman*, 424 U.S. 409, 427 (1976). The Sixth Circuit's decision circumvents *Kyles* by imposing what the majority called a "derivative" duty on police officers. Pet. App. 38a. Indeed, the Sixth Circuit would impose greater burdens on police than on prosecutors, because prosecutors must disclose only "material" evidence while police would be required to disclose evidence of "apparent" exculpatory value. Pet. App. 62a.

Second, even where courts have considered § 1983 claims against officers based on exculpatory evidence, requiring the plaintiff to show bad faith or deliberate misconduct allows unwarranted claims to be resolved quickly. *E.g.*, *McLain* v. *City of Ridgeland*, 2010 WL 780532, at *8 (S.D. Miss. Feb. 28, 2010) (granting judgment as a matter of law for defendant where, if any information was withheld from prosecutor, "it was due, at the very worst, to negligence"); *Rosales* v. *Kikendall*, 677 F. Supp. 2d 643, 649 n.2 (W.D.N.Y. 2010) (assuming *Brady* applies to prison disciplinary proceedings, dismissal granted absent allegation that defendant failed to disclose evidence "with the intent of denying plaintiff a fair hearing"); *Windham* v. *Graham*, 2008 WL 3833789, at *7 (D.S.C. Aug. 14, 2008) (dismissing pretrial detainee's claim that "police negligently failed to include [in investigative file] the evidence Plaintiff seeks"); *Moore* v. *Higgins*, 2008 WL 2225724 (E.D. Mo. May 29, 2008) (granting summary judgment on due-process claim where no showing that officer "acted with the intent to deprive Plaintiff of a fair trial"); *Ihekoronye* v. *City of Northfield*, 2008 WL 906206, at *7 (D. Minn. Mar. 31, 2008) (granting

summary judgment where "[u]ltimately, there is a total lack of any bad faith, as required for a procedural due process violation").

Still, requiring alleged bad faith by an officer has not been an unreasonable barrier for plaintiffs. Courts have allowed cases to proceed where an officer's withholding of evidence was allegedly deliberate misconduct. *E.g.*, *Glass* v. *City of Gainesville*, 2009 WL 2632801, at *4 (E.D. Tex. Aug. 25, 2009) (denying motion to dismiss reckless-investigation claim where plaintiff alleged officers "deliberately" ignored exculpatory evidence); *Friedman* v. *New York City Admin. for Children's Servs.*, 2009 WL 2222803, at *5 (E.D.N.Y. July 21, 2009) (denying summary judgment and qualified immunity where plaintiff raised question of fact whether defendant "deliberately failed to disclose" material facts); *Hernandez* v. *City of El Paso*, 662 F. Supp. 2d 596, 617-620 (W.D. Tex. 2009) (denying summary judgment on claim that defendants deliberately concealed exculpatory evidence); *Smith* v. *Short*, 2008 WL 5043917, at *6 (D. Or. Nov. 21, 2008) (denying summary judgment where defendant's "failure to disclose [exculpatory] facts could be viewed as deliberate, as opposed to negligent").

As these recent cases demonstrate, to the extent that § 1983 claims against police officers are cognizable at all in light of *Kyles*, the bad-faith standard strikes a balance that allows claims of deliberately unconstitutional conduct to proceed while protecting officers from personal liability for mere negligence. Importing a negligence standard into due process would impose intolerable new legal and financial burdens on police departments and municipalities. *Every* case involving the alleged withholding of evi-

dence—innocent, negligent, deliberate, or otherwise—would proceed past the motion-to-dismiss stage and to discovery. A plaintiff's inability to allege or prove bad faith or deliberate conduct by the police officers would *never* lead to dismissal or summary judgment. The plaintiff's burden would simply be to allege and show that some potentially exculpatory evidence *existed* but did not reach the prosecutor's files. The potential burden on local governments to defend against such claims, given their frequency, is unfathomable.

And this says nothing of the increased litigation that will be spurred by the Sixth Circuit's "apparently exculpatory" standard for triggering a police officer's constitutional obligation to forward evidence to prosecutors. This Court favors clear rules for police officers, not "difficult judgment calls" about what are ultimately questions of law. *Davis* v. *United States*, 512 U.S. 452, 461 (1994) ("The *Edwards* rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information"). What constitutes "apparently" exculpatory evidence is hardly a bright line and will give rise to countless pages of briefs and conflicting judicial decisions for years to come. In the meantime, police officers will risk personal liability for damages every time they are forced to make the essentially legal determination of whether a piece of evidence has "apparent" exculpatory value. This impractical, unworkable—and, in light of the existing obligation on prosecutors, unnecessary—standard propounded by the Sixth Circuit all but guarantees an untenable increase in litigation.

Finally, this Court should grant the petition to prevent the chilling of vigorous police work for fear of personal liability. Police officers should be encouraged to pursue all avenues in investigating reported crimes, unhampered by the fear that if they inadvertently fail to alert prosecutors to a single piece of evidence, the exculpatory value of which becomes "apparent" in hindsight, they will be personally responsible for tort damages. The perverse incentive structure such a rule imposes is evident: police officers might rationally avoid avenues that could yield potentially exculpatory evidence. After all, an officer cannot be found liable for failing to disclose evidence that he never finds. Moreover, an officer who comes to realize that she inadvertently omitted mention of some witness or piece of physical evidence in a report to prosecutors might never step forward to correct the omission, knowing that the oversight could support an award of damages. Fairness demands that a police officer not be forced to choose between admitting civil liability and doing justice.

* * *

The need for this Court's intervention is clear and urgent. District courts in the Sixth Circuit are already relying on the decision below. *E.g.*, *Hatchett* v. *City of Detroit*, 2010 WL 538648, at *10 (E.D. Mich. Feb. 10, 2010); *United States* v. *Tucker*, 2009 WL 4796471, at *2 (W.D. Mich. Dec. 9, 2009). It is critical that this Court take swift action to right the ship.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The
Supreme Court of the United States

CITY OF WARREN, MI, et al.,

Petitioners,

v.

JEFFREY MICHAEL MOLDOWAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NATIONAL FRATERNAL ORDER OF POLICE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF NATIONAL FRATERNAL ORDER OF POLICE IN SUPPORT OF PETITIONERS

Now comes the National Fraternal Order of Police ("FOP"), by and through the undersigned counsel, and pursuant to Supreme Court Rule 37.2(b) respectfully moves for leave to file its *Amicus Curiae* Brief in favor of granting Petitioners' Writ of Certiorari. The FOP sought consent to file its *Amicus Curiae* Brief from the counsel of record for all parties pursuant to Supreme Court Rule 37.2(a). This Motion is necessary as Respondent Jeffrey Michael Moldowan withheld consent for the FOP to file its *Amicus Curiae* Brief. Petitioners granted the FOP written consent to file its *Amicus Curiae* Brief as required by Supreme Court Rule 37.2(a).

The Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with more than 325,000 members with more than 2,100 state and local lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities. The FOP represents law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally. The FOP is an active representative group that serves as "The Voice of Our Nation's Law Enforcement Officers." As part of their duties, police officers must investigate, gather facts, interview witnesses and suspects, examine records, and make arrests. These officers must make decisions every day

about which witnesses to interview and which leads to follow up.

It is the duty of the FOP to protect law enforcement officers and serve the good of each and every community within its reach. There is no group more qualified to speak to the issues presented in this case. It is with these interests in mind that the FOP requests this Court to grant its Motion for Leave to file its *Amicus Curiae* Brief. The Sixth Circuit's decision finding that an officer is subject to civil liability for failing to turn over evidence that is later deemed exculpatory is extremely dangerous in that the decision completely disregards an officer's good or bad faith efforts. In fact, the decision finds police officer's good faith to be completely irrelevant.

The Sixth Circuit's decision imputes the *Brady v. Maryland* standard to law enforcement. The Sixth Circuit has wrongfully extended a duty reserved for prosecutors to police officers. Moreover, this duty is extended without giving police officers the proper protection of immunity that is guaranteed to prosecutors.

The FOP requests this Honorable Court to review the impracticable and unworkable standard set by the Sixth Circuit. The issues presented are of upmost importance to law enforcement and impact the day-to-day operations of police officers.

Accordingly, the National Fraternal Order of Police respectfully requests that this Honorable Court grant its Motion for Leave to file an *Amicus Curiae*

Brief and that the Court grant the Petitioners' Writ of Certiorari.

The National Fraternal Order of Police's *Amicus Curiae* Brief is filed contemporaneously herewith as required by Supreme Court Rule 37.2(b).

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* NATIONAL FRATERNAL ORDER OF POLICE

Now comes the National Fraternal Order of Police, on behalf of the more than 325,000 members of law enforcement personnel nationwide, by and through undersigned counsel, and respectfully submits its Brief in support of the Petitioners for a Writ of Certiorari.[1]

I. INTEREST OF *AMICUS*[2]

A. The National Fraternal Order of Police – More than 325,000 Men and Women of Law Enforcement Urges Reversal of the Decision of the Sixth Circuit Court of Appeals.

The National Fraternal Order of Police represents more than 325,000 law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally. Significant interference with the

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[1] The office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contribution to the preparation or submission of this Brief.

[2] This Brief is accompanied by a Motion for Leave pursuant to Supreme Court Rule 37.2(b). Counsel for Petitioners granted written consent to file this Brief. Counsel for Respondent did not give written consent, requiring the National Fraternal Order of Police to file a Motion for Leave. Counsel of record for both the Petitioners and the Respondent received timely notice of the intent of the National Fraternal Order of Police to file this Brief as required by Supreme Court Rule 37.2(a).

work of law enforcement personnel is squarely presented in this case. Simply stated, the decision of the Sixth Circuit, holding that a police officer violates the Constitution and, is in turn, liable for damages in civil ligation if he fails to provide prosecutors with any piece of evidence that a jury later determines has "apparent" exculpatory value is an extremely dangerous precedent. On that view, the officer's good or bad faith is irrelevant. Certiorari should be granted because that ruling conflicts with this Court's precedent and is the subject of a significant and widely acknowledged circuit conflict.

There is no one group more qualified to speak to the issues presented than the National Fraternal Order of Police. The FOP perspective on this issue is unique, and particularly appropriate to the substantive law enforcement issues raised within this case. Law enforcement personnel nationwide, and at an international level, work every day to promote and ensure the safety of people everywhere. It is America's law enforcement personnel who patrol the streets, protect people and their families, investigate crimes, and arrest criminals. As a part of these tasks, law enforcement personnel are engaged in many different efforts, including but not limited to investigation, witness interviews, interviews with suspected criminals, and review of substantive evidentiary matters. Law enforcement personnel may go undercover to investigate and/or infiltrate suspected crime groups. Federal, state and local police officers annually conduct hundreds of thousands of

investigations involving millions of pieces of evidence. The decision of the Sixth Circuit holding that police officers may be held liable for even innocently failing to disclose evidence that may eventually be deemed exculpatory cannot be overstated.

The undersigned counsel of record has been General Counsel for the National Fraternal Order of Police since 2001. The General Counsel for the FOP has previously served as General Counsel for the Columbus, Ohio chapter of the NAACP and the Columbus Urban League. The FOP's General Counsel has also been the Safety Director for the City of Columbus, Ohio, overseeing the day-to-day operations of the Division of Police and the Fire Department. As Safety Director and counsel to the police, the undersigned reviewed the conduct of officers as well as disciplined, discharged, defended, prosecuted, trained, and promoted officers. Police officers are required to make more critical decisions than members of any other profession. Thus, to place this burden and standard on them is ineffective.

Based on the undersigned's many years of practice and involvement with law enforcement, this decision neither improves the practices of policing, nor does it add to the protection of citizens' constitutional rights. The most troubling aspect of the Sixth Circuit's holding is that an officer's good or bad faith and intentions are not relevant. The Court did not find that the officers acted in bad faith, nor did it find that there was a pattern and/or practice of the

officers withholding evidence. This is nothing short of bad law that should be reversed.

It is with these interests in mind that the National Fraternal Order of Police and its membership respectfully request this Honorable Court to grant the Petition for a Writ of Certiorari and reverse the decision of the Sixth Circuit Court of Appeals on behalf of all officers.

B. Key Facts

The Sixth Circuit's decision adopts a standard that makes it exceptionally difficult for police officers to go about the business of police work. This decision also conflicts with Supreme Court precedent and the decisions of several other circuits. There is nothing unique about police investigations that merit deviating from the "good faith/reasonable" standard applied in other criminal matters. The facts of this case demand a fair and more reasonable application as well as a more common sense approach to police work.

The record below indicates a domestic violence situation culminating in a brutal kidnaping, rape, and assault that occurred during August 1990. The 1990s were some of the most dangerous and violent times in America. The crime rate in almost every major city, including Detroit and its surrounding cities increased drastically. Many of the crimes were

felony-related and violent.[3] As a result, there was a dramatic rise in the number of police investigations.

The victim of the underlying assault, Ms. Fournier, specifically identified Mr. Moldowan, her ex-boyfriend, as her attacker.[4] Pet. App. at 6a. The extent of the victim's injuries required officers to wait two (2) days before they could interview her. *Id.* Furthermore, the extent of injuries required the victim to write her answers down in response to written questions provided by the detectives. *Id.*

The victim gave a sworn statement that she had recently been threatened with physical harm by Mr. Moldowan and that he had beaten her in the

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[3] *See*, Robert D. McFadden, *New York Leads Big Cities in Robbery Rate, but Drops in Murders*, N.Y. Times, Aug. 11, 1991 (citing Federal Bureau of Investigation, *Uniform Crime Reports for 1990*). The author stated that according to the Federal Bureau of Investigation's Uniform Crime Report for 1990, overall violent crime increased eleven percent (11%) over 1989, with homicides and forcible rape each up 9 percent (9%) and robbery and aggravated assault each up eleven percent (11%). Among the major cities in the country, Detroit had one of the highest murder rates in the country.

[4] *See*, Patricia Tjaden and Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* (2000). The authors point out that approximately 1.3 million women are physically assaulted by an intimate partner annually in the United States. Sixty-four percent (64%) of the women who reported being raped, physically assaulted, and/or stalked since age 18 were victimized by a current or former husband, cohabiting partner, boyfriend, or date.

past. *Id.* at 7a. She also identified the other perpetrators as friends of Mr. Moldowan, with whom she was acquainted. *Id.* The victim claimed she knew all of her abductors, all four (4) of whom were Caucasian males. *Id.* Her testimony did not change at any point throughout the initial investigation or trial.

Ms. Fournier's statements were corroborated by her sister who indicated that she had witnessed first-hand the threats and prior violent behavior of Mr. Moldowan. *Id.* The victim's sister also testified that she received a call on the day the victim was found. *Id.* at 8a. She indicated that she recognized the caller as Mr. Moldowan. *Id.* Mr. Moldowan inquired as to Ms. Fournier's location. *Id.* The victim's sister knew that Ms. Fournier was in the hospital, but lied and told Mr. Moldowan that she was at home with her. *Id.* He then exclaimed "No, no she's not . . . She's at the morgue." *Id.* The victim's sister testified further that Mr. Moldowan called her home on the previous day looking for the victim, and that Mr. Moldowan stated "that he was going to get her." *Id.*

The record also revealed the expert testimony of a Dr. Alan Warwick, D.D.S., forensic odontologist and consultant for the Wayne County Medical Examiner's Office and a consultant to Macomb County, Monroe County, and the Michigan State Police. *Id.* Dr. Warwick testified that the "chances are . . . 2.1 billion to one that another individual can make those same marks," referring to dental impressions taken from Mr. Moldowan as compared with the victim's right

arm. *Id.* at 8a-9a. His findings were conclusive that Mr. Moldowan was the victim's attacker. *Id.* at 8a.

The Respondent does not allege that the detectives or the City of Warren in any way suborned the perjury of Dr. Warwick. This information stands as independent, objective evidence known and relied upon by the detectives during their investigation and at the initial trial of Mr. Moldowan.

This evidence is restated herein to properly frame the context of law enforcement's investigation which underlies the good faith reasonableness of law enforcement's efforts. Although some potentially exculpatory evidence might not have made it to the prosecutor, there is no reason to conclude that the Sixth Circuit's rule would have led to the discovery of that evidence. If this is the rule of law it is very likely that police officers will spend more time storing and evaluating the evidence in their possession rather than devoting more time collecting additional evidence. There are real restraints on what a police officer can reasonably accomplish and, thus, they should not be held to an unrealistic standard. These are operational realities in police work that can not be ignored.

II. ARGUMENTS IN SUPPORT OF PETITIONERS

A. This Case Presents an Opportunity for this Honorable Court to Support Reasonable "Good Faith" Law Enforcement Efforts and Clarify the Existing "Good Faith" Standard for Qualified Immunity in the Civil Context.

The National Fraternal Order of Police believes the decision of the Sixth Circuit to be unwise, unworkable, and unnecessary. As discussed herein, the FOP respectfully requests this Honorable Court to grant Petitioners' Writ of Certiorari to reverse the decision of the United States Court of Appeals for the Sixth Circuit and remand this matter to the District Court for review of the qualified immunity issues using a good faith standard.

The decision of the Sixth Circuit entirely eliminates a "good faith" standard for qualified immunity in the civil liability context. Good faith is the cornerstone of the relationship between law enforcement and the public they serve and protect. We as a society ask that law enforcement assist in keeping us safe by investigating and solving crimes. We ask that the police work diligently and always do their best. We ask law enforcement to handle a full spectrum of crimes, from car accidents to assaults to robberies and premeditated murders. In all cases we ask for them to quickly solve crimes and to restore public confidence and safety. We strive to balance these police powers with public policy and interests.

The underlying purpose behind qualified immunity is to shield government officials performing discretionary functions from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). As acknowledged by the Sixth Circuit, "[T]he rationale underlying the qualified immunity doctrine is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.'" *Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009) (quoting *Harlow*, 457 U.S. at 819).

The existing legal test for evaluating claims of qualified immunity is a three-part procedure:

(1) Determine whether a constitutional violation occurred;

(2) Determine whether the right violated was a clearly established right of which a reasonable person would have known; and

(3) Determine whether the Plaintiff has alleged sufficient facts and supported the allegations by sufficient evidence to indicate that what the official did was objectively unreasonable in light of the clearly established constitutional rights.

Williams v. Mehra, 186 F.3d 685, 691 (6th Cir. 1999) (citing *Dickerson v. McClellan*, 101 F.3d 1151, 1157-58 (6th Cir. 1996)).[5]

This test serves several purposes in the law enforcement context. First, the test acknowledges a context and that "mistakes can occur." This is consistent with this Court's decision in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001):

> The qualified immunity inquiry's concern . . . is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. An officer might correctly perceive of the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances.

Id. at 195. Second, it sets an appropriate standard for conduct, i.e., reasonableness, based on the context.

This is a "good faith" standard when applied to law enforcement efforts. Taken in conjunction with the case law regarding errors, omissions and negligence, it is easy to see the framework and analysis which bolstered that "good faith" requirement.

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[5] The sequence and mandatory nature of this inquiry was recently reconsidered by this Court in *Pearson v. Callahan*, 129 S. Ct. 808 (2009). Nonetheless, the elements remain the same, and inquiry based on reasonable, good faith efforts on the part of the government.

The Sixth Circuit's decision to depart from the reasonable "good faith" standard is hard to explain in practical application. It demands perfection, and nothing less. It provides a court with substituted judgment, sans context and with 20/20 hindsight. That type of standard is totally unworkable, impractical, and serves no real purpose.

As illustrated by this case, the Sixth Circuit's rule will allow any plaintiff to enter federal court and sue individual officers and municipal governments on an unsubstantiated allegation that is untethered from any actual evidence of bad faith. Here, the evidence in the record indicates that the "lost witness" Burroughs could not identify the officer he allegedly spoke with, nor could he identify any evidence that even suggests that Officer Ingles acted in bad faith. Allowing litigation premised on such limited evidence is an invitation for the criminally accused to storm the courts, resulting in more frequent litigation and a waste of police resources. The end product will not improve police efficacy nor will it provide additional protection for defendants. Such litigation is already a recurring problem.[6] The Sixth Circuit's rule will only magnify this problem.

The Sixth Circuit's decision ignores the reality of cases and circumstances that men and women of law enforcement handle regularly. There was no consideration given to the scope, scale, detail, nuance or

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[6] *See*, Petitioners' Writ of Certiorari, 15-16 n.1.

other variables that may be encountered by law enforcement on any given case. There was no consideration given to the hundreds of circumstances where police may not know or disclose evidence without triggering a constitutional violation, be it judgment, error or otherwise. There was no consideration given for good faith mistakes.

This decision sets an insurmountable standard that is not reasonable and does not result in practical application. Police deal with the real world. The Sixth Circuit's decision does not. The result is a standard that cannot be met and will not produce better law enforcement or a safer society.

This Honorable Court has consistently acknowledged and held that police action should be judged from an "on the scene perspective." *See, e.g.*, *Saucier*, 533 U.S. at 205 (acknowledging the unique reality of law enforcement in the context of a qualified immunity inquiry related to excessive force claims). Qualified immunity is intended to promote the "good faith" efforts of officers who serve on the "front line" and daily face raw, real issues in the performance of their duties.

In cases such as *Saucier*, *supra*, this Court specifically discussed qualified immunity, albeit in the context of a Fourth Amendment excessive force claim. Finding that a military police officer was entitled to qualified immunity, this Court acknowledged "the doctrine of qualified immunity reflects a balance that has been struck 'across the board.'" *Id.*

at 203 (quoting *Anderson v. Creighton*, 483 U.S. 635, 642, 107 S.Ct. 3034 (1987) (citation omitted)). Giving review to the standard for analysis, this Court emphasized an "objective reasonableness standard," and, "the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on the scene perspective." *Id.* at 204-205 (quoting *Graham v. Connor*, 490 U.S. 386, 394-96, 109 S.Ct. 1865 (1989)). Expanding on the nature of the inquiry this Court specifically acknowledged the purpose of qualified immunity in the context of law enforcement as one that is not precise but in fact done with reasonableness and in good faith:

> The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Id. at 205.

So, too, did the concurring opinions in *Saucier* acknowledge the interest of police. The concurrence held "'The calculus of reasonableness' must follow for the reality that 'police officers are often forced to make split second judgment' about the force a particular situation warrants 'in circumstances that are tense, uncertain, and rapidly evolving.'" *Id.* at 211 (quoting *Graham*, 490 U.S. at 396-97).

This Court considered a related issue in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988). Considering the context of a criminal investigation and the "failure to preserve evidence" by the police, this Court specifically held:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the polices' obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly requires it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the Defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Id. at 58.

The analysis of this Court in *Arizona* digs deep to discuss the importance of good or bad faith on the part of law enforcement. It should be noted that in

both *Saucier* and *Arizona*, this Court gives significant analysis to the contexts of the criminal cases, the evidence, the actions of law enforcement and the reasonableness of good or bad faith associated with those circumstances.

These cases have developed a workable, common sense framework for appropriate legal analysis that should be conducted when reviewing law enforcement for qualified immunity. Good faith is the key. Good faith, based on the context of each case, is exactly what we as a society ask for from our men and women on the front lines of law enforcement.

The National Fraternal Order of Police respectfully submits that the Sixth Circuit's decision *subjudice* is a significant, erroneous departure from the "good faith" standard and from this Court's precedent. Moreover, it is a split from the four other circuits that addressed this issue.

The new standard from the Sixth Circuit is a "hindsight is 20/20" rule. It entirely obviates the context, the front line, the case by case differences that characterize actual police work.[7] In our experience, the Sixth Circuit's decision, will not "improve" and, in fact, may radically undermine the work of law

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[7] In *Saucier*, *supra*, this Court warned that "we set out a test that cautioned against the '20/20 vision of hindsight' in favor of difference to the judgment of reasonable officers on the scene." *Saucier*, 533 U.S. at 205 (quoting *Graham*, 490 U.S. at 393-96).

enforcement. Without a good faith component the decision will do nothing but increase litigation and claims, increase associated costs to defend these claims and burden what is already a short staff of law enforcement in most jurisdictions.

It is important to note, the jurisdictions that require a showing of bad faith have allowed cases to proceed to trial. Thus, the bad faith standard does not impose an unreasonable burden on victims of alleged intentional misconduct. Rather, it strikes a reasonable balance between the rights of criminal defendants and the societal demands imposed on police.

The crime will not change. The witnesses will not miraculously tell the truth or immediately confess. Law enforcement will need to become technologically savvy to keep up with new and inventive crimes. There will still be context, differences, motives, accidents and, unfortunately, there will still be errors and oversights.

Still, it is appropriate to balance the public interests presented versus alleged constitutional deprivations. As a society, we ask for police to proceed in good faith and, therefore, we should judge them accordingly. The Sixth Circuit's decision is squarely at odds with real life, real time demands on police officers and, conversely, will not serve to advance better law enforcement. The Sixth Circuit imposes a new and burdensome demand on police officers. Imposing this standard will require that officers make no mistakes. More and more time will be spent

at their substations, headquarters, and with the prosecutors trying to be perfect.

B. This Case Presents an Opportunity for this Honorable Court to Establish a Clear Guideline Prohibiting the *Brady v. Maryland* Standard from Being Imputed to Police Officers.

In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), this Court held "[T]hat the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

Since that time there has been no explicit ruling that *Brady* should be extended to law enforcement. And yet, in addition to eliminating the good faith standard, the Sixth Circuit imputed the *Brady* standard to law enforcement. This is a double-edged sword and a standard that cannot be met.

First, this expansion of *Brady* is an enormous leap that puts the full weight and responsibility of a prosecutor's role on law enforcement. This is in direct contravention of practicality as acknowledged by the various courts that have considered the issue. The role of the prosecutor is that of a guide for the judicial process.

Second, law enforcement does not have that scope, that capacity or that authority. They perform different functions entirely. As noted in *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000):

> The *Brady* duty is framed by the dictates of the adversary system and the prosecution's legal role therein. Legal terms of art define its bounds and limits. The prosecutor must ask such lawyer's questions as whether an item of evidence has "exculpatory" or "impeachment" value and whether such evidence is "material." It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution's task of evaluating it. This is especially true because the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often involved in only one portion of the case, may lack necessary context. To hold that the contours of the due process duty applicable to the police must be identical to those of the prosecutor's *Brady* duty would thus improperly mandate a one-size-fits-all regime.

Id. at 660.

The police are the front line, the "on the scene," "street level" function of "serve and protect." As discussed at length above, that work is done amidst the variety and chaos of real life, interested persons, witnesses, alibis, evidence and motives. In addition to these distinctions between the roles of a prosecutor

and a police officer, there is one other looming difference: Prosecutors get absolute immunity.

III. CONCLUSION

It should be noted that the Sixth Circuit made no distinction or determination whether the officers engaged in conduct that could be characterized as bad faith, gross negligence, ill will, discriminatory and/or selective prosecution. Indeed there is zero evidence of such bad faith on the part of Officer Ingles. The Court made no determination whether the officers were adequately trained and, if they were adequately trained, whether they followed that training.

Thus, under the Sixth Circuit's rule, any police officer can be hauled into court based merely on an accusation by a witness (or presumably the defendants themselves) that the individual told some officer something possibly exculpatory at some point during the investigation. This sort of standard is far too flimsy and tenuous to justify imposing additional burdens and costs on police officers that will have the sole effect of undermining police efficacy while providing no benefit to potential defendants.

As this Court is well aware, our country is going through one of the most difficult economic crises in our nation's history. The struggling economy has resulted in law enforcement being laid off in record

numbers in cities throughout the country.[8] Police officers are retiring in record numbers. These

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[8] *See*, Mark Hornbeck and Charlie Cain, *Michigan Budget Cuts Hit Police Ranks: Revenue Sharing, 100 Trooper Jobs Among $304M in Cuts by Gov*, Detroit News Lansing Bureau, May 6, 2009 (describing that in Michigan, the governor cut $304 million in the budget in 2009. This budget cut resulted in 100 State Police troopers being laid off "bringing the troop strength to 968, the lowest in at least 40 years." Furthermore, the budget cut reduced "revenue sharing, which pays for police and fire protection and other municipal services. The number of local police officers is down more than 2,000 – or 9 percent – since 2002.")

See, Steve Brandt, *Minneapolis 2010 Budget Trims Police, Civilian Jobs: Minneapolis Adopted a 2010 Budget That Will Put 25 Officers and Recruits, and 30 Civilians, Out of Work*, Star Tribune, Dec. 7, 2009 (stating that in Minneapolis, the City Council adopted a budget to layoff "about a half-dozen cops already on duty and 19 recruits scheduled to hit the streets in a matter of days.")

See, Joe Guillen, *Cleveland Sends Layoff Notices to Safety Forces*, The Plain Dealer, Dec. 23, 2009 (stating that in Cleveland, the safety director "signed [layoff] notices for 67 police patrol officers" and that the notices "would be rescinded if the unions agree to a pay cut of about 4 percent.")

See, Moriah Balingit, *Nine Police Officers May Lose Jobs in North Versailles*, Pittsburgh Post-Gazette, Jan. 8, 2009 (describing that in a city just outside of Pittsburgh, the commissioners proposed a budget that would "result in the layoffs of seven part-time and two full-time officers, reducing the number of officers from five per shift to two.")

See, Bradley Olson, *City's Budget Woes May Mean Furloughs, Layoffs: Mayor Suggests Unions Delay Raises to Help Save Jobs*, Houston Chronicle, Mar. 10, 2010 (providing that the mayor of Houston is considering imposing mandatory furloughs in order to close "roughly $110 million in budget gaps during the next two years." The mayor indicated that the "key to

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economic conditions are leaving our law enforcement community in a very strained situation.[9] Many of the departments are grossly understaffed and others have substantially reduced their forces to critical levels. Overtime is being eliminated. These conditions and the Sixth Circuit's decision can only result in harm to local communities and the entire country. The burden being placed on police officers as a result of this decision is punitive. Thus, this Honorable Court should accept this case and reverse this decision.

The issues presented in this case are of paramount importance to law enforcement, their employers, and the citizens they protect. Obtaining a standard from this Court that employs "good faith"

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negotiations . . . could be the willingness of the city's police . . . union[ ] to offer concessions, such as forgoing salary increases.")

See, Julie Scharper, *Worst-Case City Budget Cuts Police, Fire, Recreation: Rawlings-Blake Says It Shows What Must Be Done if There Are No New Revenues*, The Baltimore Sun, Mar. 25, 2010 (describing that the mayor of Baltimore is also considering cutting police officers. In a budget proposal "to close a $121 million shortfall in the city's $2.2 billion budget," the mayor proposed cutting "120 police officers.")

[9] *See*, Kevin Bohn, *Police Face Cuts as Economy Falters*, Oct. 23, 2008, http://www.cnn.com/2008/CRIME/10/23/police.economy/index.html (stating that "A poll of 200 [police] departments during the summer [of 2008] by the Police Executive Research Forum . . . reported 39 percent of respondents said their operating budgets were cut because of the economy and 43 percent said the faltering economy had affected their ability to deliver services.")

will support the work of law enforcement, support their citizens and acknowledge the appropriately cast responsibility to act in good faith.

Respectfully submitted,

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